Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

GERALD F. ARENS,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Petition for Writ of Certiorari

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133pp

I.

Question One. Where the Rules of the Court of Federal Claims require the Clerk to file and serve notice of all judgments, is the Court's January 12, 1993, Docket No. 103-88C judgment void because it was not filed or served as required by the Rules?

Question Two. When a decision of the U.S. Claims Court fails to address or adjudicate a claim that was filed within the time limits mandated by the statute of limitations, and that decision is vacated and remanded by the Court of Appeals, and, on remand, after the period of time specified in the statute of limitations, the U.S. Court of Federal Claims enters judgment proclaiming that it has not retained jurisdiction over the unadjudicated claim, and, on appeal, the Court of Appeals concludes that the statute of limitations forever bars the unadjudicated claim, is petitioner denied the right to procedural due process if he is precluded from appealing or objecting to the judgment entered by the Court of Federal Claims because the Court failed to file and serve the judgment as required by the Rules of that Court?

Question Three. Where a federal statute declares it a felony to obstruct or impede the administration of the law by means of any threatening communication, and respondent places a telephone call to petitioner, a Board for Correction of Military Records (BCMR) applicant, and threatens to utilize the "big Guns" of the federal government to have petitioner criminally prosecuted and fired from his job if he continues to pursue a claim that is based on the express directive of the Commandant of the Coast Guard to "Blacklist [petitioner]", and respondent legitimizes its threats by claiming that, ex parte, it was "told" to make the call by the Attorney Advisor to the BCMR, and the application is then withdrawn in response to those threats thereby inducing the running of the statute of limitations and precluding judicial review of the BCMR decision, do the "continuing claim" or "equitable tolling" doctrines prevent respondent from benefiting from its misconduct?

Question Four. Where the General Counsel of the U.S. Department of Transportation provides petitioner with a written pledge that he will not allow respondent to delay Federal Court proceedings by means of threats to employ the "big Guns" of the Federal Government to have petitioner criminally prosecuted and fired from his job, and petitioner's reliance on the pledge of the General Counsel induces the running of the statute of limitations, is petitioner thereby denied the right to procedural due process?

II. A LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

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Respondent: The United States.

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V. CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS AND ADMINISTRATIVE AGENCIES

October 14, 1987: The U.S. Department of Transportation, Board for Correction of Military Records, (BCMR), issues Docket No. 279-84 Final Decision.

March 13, 1988: The BCMR issues its first Docket No. 40-88(R) Final Decision.

August 5, 1988: The BCMR issues a Special Order suspending its Docket No. 40-88(R) Final Decision.

October 18, 1988: The Claims Court issues an order staying Docket No. 103-88C proceedings pending a final decision by the BCMR on its Docket No. 40-88(R).

February 10, 1989: The BCMR renders its second Docket No. 40-88(R) Final Decision.

October 31, 1991: The Claims Court renders Docket No. 103-88C Opinion. Arens v. United States, 24 Cl.Ct. 407 (1991).

July 8, 1992: The U.S. Court of Appeals for the Federal Circuit issues Docket No. 92-5032 decision vacating and remanding the Docket No. 103-88C Opinion of the U.S. Claims Court after concluding that: "The legal error made by the Board and ratified by the Claims Court is pervasive to the history of this case." Arens v. United States, 969 F2d 1034, 1040 (Fed.Cir. 1992).

December 18, 1992: The U.S. Court of Federal Claims (formerly the U.S. Claims Court) issues Docket No. 103-88C Remand Order vacating the October 14, 1987, Docket No. 279-84 final decision of the BCMR. [App. 66-70].

January 12, 1993: The U.S. Court of Federal Claims enters Docket No. 103-88C judgment proclaiming that: "jurisdiction is not retained by this court in this case." [App. 71].

January 29, 1993: The BCMR vacates its October 14, 1987, Docket No. 279-84 Final Decision.

March 11, 1994: The BCMR renders Docket No. 69-93 Final Decision. [App. 59-65].

March 29, 1995: The U.S. Court of Federal Claims conducts a Hearing and renders a Bench Ruling on Docket No. 94-289C. [App. 3-47].

March 30, 1995: The Court of Federal Claims, Docket No. 94-289C, bars judicial review of BCMR Docket No. 69-93 decision by application of the statute of limitations. [App. 48-49].

March 31, 1995: The Court of Federal Claims dismisses the Docket No. 94-289C complaint. [App. 50].

June 15, 1995: The U.S. Court of Federal Claims issues Docket No. 94-289C Order denying petitioner's motion to set aside the March 31, 1995, judgment. [App. 55-56].

June 20, 1995: The U.S. Court of Federal Claims enters a Docket No. 94-289C judgment denying petitioner's motion to set aside the March 31, 1995, judgment. [App. 57].

June 22, 1995: The Court of Federal Claims enters a Docket No. 94-289C corrected judgment denying petitioner's motion to set aside the March 31, 1995, judgment. [App. 58].

December 6, 1995: The U.S. Court of Appeals for the Federal Circuit issues Docket No. 95-5095, Notice and Judgment Without Opinion affirming the Docket No. 94-289C decision of the U.S. Court of Federal Claims. [App. 1-2].

VI. STATEMENT OF THE BASIS FOR JURISDICTION

(1). The date the judgment or order sought to be reviewed was entered is December 6, 1995. [App. Page 1-2].

(2). There are no judgments or orders respecting rehearing, and there is no order granting an extension of time to file the petition for a writ of certiorari.

(3). There is no Rule 12.5, cross-petition for a writ of certiorari.

(4). The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is provided by Sup. Ct. R. 10(a), 28 U.S.C.A.:

> [A] United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; ... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power ...

(5). Rule 29.4(b) and (c) notifications are inapplicable.

VII. THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

As provided by Rule 14.1(f), the following statutes and regulations are set out verbatim in the appendix.

U.S. Const. amend. V. ..... App. 72
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U.S. Court of Federal Claims; Rule 5 ..... App. 72-73
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VIII. A CONCISE STATEMENT OF THE CASE

(1). Statement Of The Case Setting Out The Facts Material To Consideration Of The Questions Presented.

Petitioner contends that the Docket No. 95-5095 Judgment of U.S. Court of Appeals for the Federal Circuit improperly affirms the Docket No. 94-289C decision of the U.S. Court of Federal Claims. That is, the affirmed Court of Federal Claims decision interprets and applies the statute of limitations in a manner that conflicts with stare decisis and relevant decisions of this Court. The affirmed decision also relies on a judgment that is void (due to the fact that the judgment was not filed and served as required by the Rules of the Court). And, as specified below, the decision of the Court of Federal Claims fails to properly recognize the "continuing claim" and "equitable tolling" doctrines.

(a). The "Blacklist" Directive And The "Stacking Memo."

On October 27, 1981, The Secretary of the U.S. Department of Transportation approved the Report of the U.S. Coast Guard Promotion Board that was convened on October 5, 1981. Petitioner was passed-over for promotion by that Board. The Aviation Officer Member assigned to that Board was Commander Robert A. Melvin III. [App. 91-92, 94].

On October 21, 1982, The Secretary of the U.S. Department of Transportation approved the Report of the Selection Board that was convened on October 4, 1982. Petitioner was also passed-over for promotion by that Board. The Aviation Officer Member assigned to the Board was Commander Lance A. Eagan. [App. 91-92, 94].

On June 30, 1983, petitioner was involuntarily retired from active duty military service as a result of having been considered, (but not selected), for promotion to the grade of Commander, (0-5), by the 1981 and 1982 Promotion boards.

On August 4, 1984, petitioner received an unsolicited parcel containing numerous "Official Use Only" documents. The documents included an "Official Use Only ... Office Of The Commandant Correspondence/Action Sheet" containing the express directive **"Blacklist [Petitioner]"**. [App. 96]. Also included was a July 23, 1980 "stacking" memo authored by Coast Guard Deputy Chief of Staff (Captain George Roy). The memo specifically designates Robert A. Melvin and Lance A. Eagan for membership on petitioner's 1981 and 1982 promotion boards: "Board 1. Bob Melvin ... 2. Lance Eagan". [App. 94]. (The promotion board "stacking" procedure utilized by the Coast Guard is outlined by respondent on page 4 of its Claims Court Docket No. 103-88C, May 16, 1988, motion to dismiss).

On September 12, 1984, based on information contained in the "Official Use Only" documents, petitioner filed an application with the U.S. Department of Transportation, Board for Correction of Military Records (BCMR). The Docket No. 279-84 application requested the correction of injustice caused by the unauthorized alteration of petitioner's Personnel File and the injustices caused by the "Blacklist" directive issued by the Commandant of the Coast Guard.

The October 14, 1987, BCMR Docket No. 279-84 final decision granted the primary relief requested by correcting the unauthorized alterations of the personnel record that was utilized by petitioner's promotion boards. The Board reasoned that additional relief was unwarranted because, even without the unauthorized alterations: "it is unlikely that he would have been selected for promotion ..."

On November 6, 1987, citing no less than thirteen specific "Official Use Only" documents ignored by the Board in its Docket

No. 279-84 decision, petitioner filed BCMR Docket No. 40-88(R) application for reconsideration.

Due to the six-year statute of limitations, on February 17, 1988, petitioner filed a petition in the U.S. Claims Court (Docketed as No. 103-88C) before a final decision was rendered on BCMR Docket No. 40-88(R). Seeking judicial review, petitioner claimed that the BCMR's Docket No. 279-84 decision was arbitrary, capricious, and contrary to the law.

On February 29, 1988, petitioner filed a motion to stay Claims Court proceedings pending a decision on his BCMR Docket No. 40-88(R) application for reconsideration.

On March 13, 1988, the BCMR issued its first Docket No. 40-88(R) Final Decision. The decision denied all relief requested by petitioner.

On June 2, 1988, counsel for respondent (Mr. John Groat) requested that petitioner consent to an extended stay of Claims Court proceedings. As requested, petitioner agreed to further BCMR proceedings for the good faith purpose of allowing the Board the previously foregone opportunity to address and explain the "Official Use Only" documentation submitted in support of his Docket No. 279-84 application. Pursuant to the agreement, on August 5, 1988, the BCMR issued a: "Special Order Subsequent To Final Decision ..." According to the order: "the final decision in this proceeding (BCMR 40-88(R)) is suspended pending the findings and conclusions of the Board after an oral hearing."

On October 18, 1988, the U.S. Claims Court granted respondent's motion to stay proceedings pending a final determination by the BCMR.

(b). BCMR Docket No. 40-88(R) Application Is Withdrawn In Response To Threats To Have Petitioner Criminally Prosecuted And Fired From His Job.

On November 4, 1988, counsel for respondent (Commander Ronald S. Matthew) filed a BCMR motion requesting to file a post-hearing brief and affidavit. The motion falsely certified that a copy of the motion was provided to petitioner prior to the October 5th hearing "on September 27, 1988".

On November 8, 1988, petitioner filed an opposition to any post-hearing filings based on the express prohibition of 33 C.F.R. § 52.35-1(c): "in any case in which a hearing has been held, the Board may not accept documentary evidence after the hearing ..."

Because respondent certified that petitioner was provided with a copy of its motion prior to the hearing, the false certification was also opposed.

As stipulated by Commander Matthew, Ms. Nancy Battaglia (the "Attorney Advisor" to the BCMR) immediately called to inform him of the opposition filed by petitioner, and to misinform him that the opposition accused him of "fraud." [App. 79-80]. In response to that call, CDR Matthew promptly amended the false certification by filing a record correction. Also on November 8th, (before he received the filed opposition), Matthew called petitioner as he was "told" to do by Ms. Battaglia. [App. 80]. During the recorded conversation that followed, with emphasis added, Matthew issues the threat:

> There's no way you can win this thing ... Melvin and Eagan will swear to whatever it takes to shoot you down ... so if you continue to play this silly game, I have some ... big guns that I can bring to bear against you. [App. 81].

In response, on November 14, 1988, petitioner unconditionally withdrew his BCMR application with the following language:

> In an attempt to forestall the "big guns" from being brought into play, and to hold off interference with the contractual relationship between applicant and his employer, applicant also plans to abandon the suit filed in the U.S. Claims Court.

(c). Promotion Board Members Melvin And Eagan Admit That Petitioner Was Treated With Prejudice Due To His Status As A Flight Safety Officer.

Petitioner was formally trained and assigned duties as a Major Field Code 34 Flight Safety Officer and Major Field Code 35 Aviator. In that capacity, petitioner advocated against the policy of permitting senior officers to pilot Coast Guard aircraft while alcohol intoxicated. (Like Captain Frank W. Olson who was honored with a Distinguished Flying Cross for flying a mission while grossly intoxicated on November 14, 1981). On page 3 of its May 16, 1989, Claims Court Docket No. 103-88C motion to dismiss, respondent stipulates: "[Petitioner] served as a flight safety officer in the Coast Guard and, in that capacity, he sought to highlight the dangers associated with flying under the influence of alcohol."

Evidence presented at the October 5, 1988, BCMR oral hearing, revealed that on November 22, 1965, and December 3, 1975, promotion board member Eagan summarily rejected unsolicited drug/alcohol counseling offered by petitioner. It was also revealed that, on March 24, 1970, board member Melvin rejected unsolicited drug/alcohol counseling offered by petitioner.

On page 24 of its November 23, 1988 post-hearing brief, respondent judicially admits that promotion board members Melvin and Eagan treated petitioner with prejudice expressly because of his status as a Flight Safety Officer:

> Both officers also mentioned that the applicant's rather narrow specialty within a specialty, that is; flight safety as a sub-specialty of aviation, most probably was the cause of his failure of selection.

(d). Due To Intervention By The General Counsel, Petitioner Does Not Abandon The Suit Filed In The U.S. Claims Court.

On January 26, 1989, without notice or solicitation, Mr. B. Wayne Vance, General Counsel of the Department of Transportation, intervened with a written pledge that he would not permit respondent's conduct to delay or interfere with federal court proceedings:

> If you believe that any specific actions have been taken or are being initiated against you by the Coast Guard, in reprisal for your pleadings or arguments before the Board (or, for that matter, before the Federal Courts), please contact me immediately ... [App. 95].

On February 10, 1989, the BCMR rendered its final decision on the withdrawn, Docket No. 40-88(R), application concluding that: "The written evidence in this case, especially Coast Guard Exhibits A, B, C, D, E, and F, on their face raise serious issues of Coast Guard propriety." The Board also concluded:

> The evidence establishes that Captain Roy, the Deputy Chief of Staff from 1978 until his retirement on July 1, 1981 ... inquired as to the identity of Ms. McHenry on a draft response to her letter, and, upon receipt of that information, wrote "Blacklist [Petitioner]" on a copy of the routing slip. Such a notation was highly improper and should not have been made.

However, like its March 13, 1988, Docket No. 40-88(R), first "final" decision, the February 10th decision denies all relief sought by petitioner after incongruously concluding:

> The evidence presented does not establish that there was any plan or conspiracy to deny the applicant selection for promotion and thus force him out of the Coast Guard or that he was retaliated against in any way.

Because of petitioner's failure to exhaust his administrative remedies, (as required by his June 2, 1988 agreement with respondent), when petitioner withdrew his BCMR application he stated his intention: "to abandon the suit filed in the U.S. Claims Court." However, all administrative remedies were subsequently exhausted by the BCMR when it rendered its February 10, 1989 final decision on the withdrawn application. Consequently, relying on Mr. Vance's post-withdrawal pledge of security, on March 27, 1989, petitioner amended his Claims Court complaint to include, (as Count Fifteen), the November 23, 1988 admission of respondent that (in violation of federal law and service regulations) petitioner was treated with prejudice by the promotion boards because of his status as a Flight Safety Officer.

On October 31, 1991, without acknowledging or adjudicating respondent's stipulation that petitioner was treated with prejudice by the promotion boards, the Claims Court rendered its Docket No. 103-88C decision granting respondent's motion for summary judgment.

On appeal, on July 8, 1992, the U.S. Court of Appeals for the Federal Circuit vacated and remanded the Docket No. 103-88C decision of the Claims Court after concluding: "The legal error made by the Board and ratified by the Claims Court is pervasive to the history of this case." Arens v. United States, 969 F2d 1034, 1040 (Fed.Cir. 1992). The Court also concluded that the conduct of respondent was: "disingenuous." Id.

On October 13, 1992, (as required by the June 2, 1988 agreement with respondent), petitioner filed an application with the BCMR requesting a correction of the previously unadjudicated injustices caused by the admitted prejudice of the promotion boards.

On December 18, 1992, Court of Federal Claims ordered the BCMR to vacate its October 14, 1987, Docket No. 279-84 final decision. The BCMR was also ordered to withdraw petitioner's Docket No. 40-88(R) application. [App. 66-70].

On January 12, 1993, the Court of Federal Clams entered a judgment stating that: "jurisdiction has not been retained by the court in this [Docket No. 103-88C] case." [App. 71]. However, petitioner is denied notice of the judgment due to the failure of the Court to serve notice of the judgment as required by RCFC 77(j) and 5(c). As defined by RCFC 5(d), the Clerk of the Court also failed to file the judgment.

On January 29, 1993, the BCMR vacated its Docket No. 279-84 decision. And, the application filed on October 13, 1992, was assigned Docket No. 69-93.

Subsequently, on March 11, 1994, the BCMR denied all relief sought in the Docket No. 69-93 application after concluding that the admission of prejudice by the promotion boards:

> [I]s argumentative and purely speculative. This comment does not constitute sufficient evidence to demonstrate that there was an error or injustice concerning the applicant's failures of selection. [App. 64].

The BCMR also concluded: "Accordingly, it is appropriate to consider the statute of limitations as running from the December 1992 United States Court of Federal Claims decision." [App. 63-64].

On May 6, 1994, petitioner filed Docket No. 94-289C complaint in the U.S. Court of Federal Claims seeking review of the BCMR Docket No. 69-93 decision. In his petition, petitioner claimed that the BCMR unlawfully concluded that respondent's admission of prejudice: "is argumentative and purely speculative."

On July 5, 1994, respondent filed a motion to dismiss the Docket No. 94-289C complaint based on its allegation that the claims asserted by petitioner are barred by the statute of limitations. Petitioner was thereby provided with initial notice of respondent's plan to renege on its June 2, 1988, agreement to stay proceedings until the BCMR rendered a final determination. (Because the Court of Appeals vacated all prior BCMR actions with its July 8, 1992 decision, a final determination was not rendered by the BCMR until publication of its Docket No. 69-93 final decision).

Pursuant to its March 30, 1995 order, [App. 48-49], on March 31, 1995, the Court of Federal Claims granted respondent's motion to dismiss petitioner's Docket No. 94-289C complaint. [App. 50].

On May 18, 1995, in accordance with RCFC 60, [App. 74], petitioner filed a motion to set aside the March 31, 1995, judgment based on the failure of the Court of Federal Claims to file and serve the January 12, 1993, judgment as required by the Rules of the Court. [App. 52-54]. As provided by RCFC 60(b)(4), petitioner claimed that the judgment is "void".

On June 15, 1995, the Court issued an order denying petitioner's motion to set aside the March 31, 1995 judgment. [App. 55-56]. On June 20, 1995, the Clerk entered judgment denying petitioner's "March 31, 1995, motion to set aside judgment ..." [App. 57]. After being advised that no such motion existed, on June 22, 1995, the Clerk issued a "corrected judgment" denying petitioner 's "May 18, 1995, motion to set aside judgment ..." [App. 58].

(2). Basis For Federal Jurisdiction In The Court Of First Instance.

Pursuant to 28 U.S.C. §1491, the U.S. Court of Federal Claims obtained jurisdiction to review and adjudicate the claims set forth in appellant's Docket No. 94-289C complaint.

The Court of Appeals for the Federal Circuit has statutory jurisdiction to review decisions of the Court of Federal Claims:

> The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction ... of an appeal from a final decision of the United States Court of Federal Claims ...

28 U.S.C. § 1295(a)(3)

IX. A DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The only issue on appeal in this case involves the application of the statute of limitations. Ironically, this petition is supported by the judgment of the BCMR on that issue. In its Docket No. 69-93 decision, the BCMR concluded that the coerced withdrawal of petitioner's prior application served to suspend the running of the statute of limitations: "Accordingly, it is appropriate to consider the statute of limitations as running from the December 1992 United States Court of Federal Claims decision." [App. 63-64].

The facts surrounding the coerced withdrawal of petitioner's BCMR application are not in dispute.

> In the instant case, the parties agree that the record of the administrative proceedings, as filed, presents no facts in dispute and that the instant case is ripe for disposition by a motion for summary judgment.

Arens v. United States, 24 Cl.Ct. 407, 415 (1991).

By affirming application of the statute of limitations to bar petitioner's claim, the December 6, 1995, Docket No. 95-5095, Judgment of the Court of Appeals, (sustaining the Docket No. 94-289C decision of the U.S. Court of Federal Claims), serves to perpetuate the case history of pervasive legal error. Specifically, the affirmed decision interprets and applies the statute of limitations in a manner that conflicts with stare decisis and relevant decisions of this Court. The affirmed decision also relies on a judgment that is void (due to the fact that the judgment was not filed and served as required by the Rules of the rendering Court). And, the decision fails to properly recognize the "continuing claim" and "equitable tolling" doctrines.

(1). The Statute Of Limitations.

Pursuant to 28 U.S.C. § 2501: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." Section 2401(a) parallels the provisions of section 2501, and provides, in pertinent part, that: "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." As specified by this Court, the role of precedent and stare decisis are of fundamental importance to the interpretation and application of the statute of limitations.

> Stare decisis is "of fundamental importance to the rule of law," Welch v. Texas Dept. of Highways and Public Transportation, 483 U.S. 468, 494, 107 S.Ct. 2941, 2957, 97 L.Ed.2d 389 (1987), because, among other things, it promotes stability and protects expectations. Vasquez v. Hillery, 474 U.S. 254, 265-266, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). Although always an important guiding principle, it has "special force" in cases such

> as this one that involve statutory interpretation because Congress is in a position to overrule our decision if it so chooses. Patterson v. McLean Credit Union, 491 U.S. 164, 172-173, 109 S.Ct. 2363, 2370-2371, 105 L.Ed.2d 132 (1989).

Irwin v. Department of Veterans Affairs, 498 U.S. 89, 100 n.3 (1990).

The U.S. Court of Claims provides a summary of the design, philosophy, and purpose of the statute of limitations as determined by this Court.

> The statute of limitations is one of finality, designed to protect parties from stale claims and bar the possibility of court suits after a reasonable time has passed. Guaranty Trust Co. v. United States, 304 U.S. 126, 136, 58 S.Ct. 363, 82 L.Ed. 525 (1938). The philosophy of limiting the time for initiation of actions is based on a pragmatic desire to 'spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded. ... Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945), reh. denied, 325 U.S. 896, 65 S.Ct. 1561, 89 L.Ed. 2006 (1945). In addition, a crucial purpose of limitation of actions is to put an opponent on notice in order that he may preserve his defenses. Hodges v. United States, 111 F.Supp. 268, 125 Ct.Cl. 405 (1953).

Homey v. United States, 536 F.2d 360, 363-364 (1976).

The 6-year statute of limitations on actions against the United States is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed. However, as determined by this Court, the design, philosophy, and purpose of the statute are intended to provide a defendant with a shield to protect against stale claims; the statute is not intended to provide defendant with a sword to use as a weapon for perpetuating injustice. This Court has recognized that continuing claims, and claims subject to equitable tolling, are not barred by the statute.

(2). Because The Court Failed To Serve And File Its January 12, 1993 Judgment, The Unadjudicated Claims Reasserted In Petitioner's Docket No. 94-289C Complaint Are Not Barred By The Statute Of Limitations.

The failure of the Court to serve notice of its January 12, 1993 judgment is evidenced by the extensive, four-page listing of "Action By Other Tribunal Or Body" filed with Petitioner's May 1, 1994, Court of Federal Claims Docket No. 94-289C complaint. (The complaint is void of any citation to the judgment).

The Court's failure to serve the January 12, 1993 judgment is also indicated by the lack of a signed receipt (such receipts were required prior to delivery of other Court orders, opinions, and judgments mailed to petitioner). Addressing the failure of the Court to serve the judgment, the following exchange occurred during oral argument in the Court of Federal Claims [App. 13]:

> THE COURT: Are you saying, are you charging our Clerk with failing to mail this to you?
>
> MR. ARENS: Well I investigated, Your Honor. And at the time, at about that time there was a mail carrier in our [local area] who was arrested for burning mail instead of delivering it. After I received defendant's pleadings. Now I do not know whether or not, and I haven't stopped down to the Clerk.

At the time of oral argument petitioner was unaware of the reason for his non-receipt of the Docket No. 103-88C entry of judgment. Consequently, with its Docket No. 94-289C decision, the Court of Federal Claims applied the statute of limitations to bar its review of the BCMR Docket No. 69-93 decision after concluding that; pursuant to the January 12, 1993 judgment, jurisdiction was not retained by the Court. [App. 39-47].

On May 10, 1995, (in response to an inquiry by petitioner), the Clerk of the Court provided a copy of the judgment and an acknowledgment that the judgment was not served or filed with a certificate of service. The Court thus failed to serve and file notice of its January 12, 1993 entry of judgment as required by its own rules. With emphasis added, RCFC 77(j) commands: "Immediately upon the entry of an order or judgment, the clerk **shall** serve a notice of the entry in **the** manner provided for in Rule 5 upon each

party ..." [App. 74]. With emphasis added, RCFC 5(c) mandates: "**All papers** after the complaint required to be served upon a party, **together with a certificate of service, shall** be filed with the court ..." [App. 73]. With emphasis added, RCFC 5(d) provides the following definition: "**Filing with the Court Defined.** The filing of papers with the court **as required by these rules shall be made by filing them with the clerk of the Court** ..." [App. 73].

With emphasis added, RCFC 1(a)(2) provides compulsory guidelines for the adjudication of issues related to the interpretation and application of the Rules of the Court of Federal Claims: "These rules **shall** be construed to secure the just, speedy, and inexpensive determination of every action."

If the Rules of the Court were intended to give the Clerk discretion, the Rules would have describe that duty with discretionary language. That is, if discretion was intended, the discretionary words "should" or "may" would have been used instead of the mandatory "shall" term.

When the Court of Appeals concluded that the Claims Court Docket No. 103-88C decision ratified "pervasive" legal errors, it did not exclude the Clerk of the Court from that determination.[1] The Clerk amply demonstrated such errors with its treatment of petitioner's May 18, 1995 motion to set aside the March 31, 1995 judgment of the Court. (The motion was based on the failure of the Clerk to serve and file the January 12, 1993 judgment). On June 15, 1995, the Court issued an order denying the motion. [App. 55-56]. On June 20, 1995, the Clerk entered judgment denying Petitioner's "March 31, 1995, [sic] motion to set aside judgment ..." [App. 57]. On June 22, 1995, (after being advised that no such motion had been filed), the Clerk issued a "corrected judgment" denying Petitioner's "May 18, 1995, motion to set aside judgment ..." [App. 58].

Without citing authority, the June 15, 1995 order of the Court of Federal Claims concludes that the requirements of RCFC 77(j) and 5(c)-(d) do not apply to the Clerk's office: "No provision of the rules extends to the Clerk's office the requirements for a certificate of service for opinions, orders, or other documents mailed to the parties in the case." [App. 56]. The Court thus violated the guidelines mandated by this Court.

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[1] Arens v. United States, 969 F2d 1034, 1040 (Fed. Cir. 1992).

> A rule of the court thus authorized and made has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. ... The courts may rescind or repeal their rules, without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rules once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it.

Rio Grande Irrigation Co. v. Gildersleeve, 174 U.S. 603, 608-09 (1899).

Citing as authority, Rio Grande Irrigation Co., 174 U.S. at 608, the Court of Appeals for the Federal Circuit previously determined that rules adopted by the Court of Federal Claims are binding on that court.

> 28 U.S.C. s 2503(b) (1988), ... codified congressional authority for the Claims Court to prescribe its own rules of practice and procedure ... (citations omitted.) Thus, unlike the United States district courts, which lack the power to promulgate their own rules, 28 U.S.C. ss 2071, 2072 (1988), Congress authorized the Claims Court to adopt its rules without the need for supervisory or statutory oversight. It is well established that a court's procedural rules promulgated pursuant to statutory authorization are deemed to have the force and effect of law. (Citations omitted.) More important, however, is the fact that the rule, once adopted by the court, is binding on both the court and the parties litigating before the court ...

Mortenson v. United States, 996 F.2d 1177, 1183-84 (1993) (emphasis added).

Other Federal Circuit Courts recognize that judges must recognize and honor the rules of their court. "While, of course, the rules of the court bind the judges of the court as much as its litigants." Clawans v. Whiteford, 55 F.2d 1037, 1038 (D.C. Cir. 1932). Other legal authority also recognizes that courts are bound by their rules and should not avoid the merits of a case by using procedural rules to dispose of that particular case. Accordingly,

when the Court failed to serve and file its January 12, 1993 judgment, the judgment was voided.

> Rules of the court properly adopted are binding on the court and its officers ... Modern rules of procedure are intended to allow the trial court to reach the merits of the case, not to dispose of that case on technical niceties ... a mandatory rule which limits the power of the court as well as the parties must be complied with, and acts not complying therewith are void.

21 C.J.S. Courts § 130 (1990) (emphasis added).

Unquestionably, a certificate of service is intended to ensure notice. By claiming that the requirements for a certificate of service do not extend to the Clerk's office, [App. 56], the Courts below consequently conclude that petitioner was not entitled to notice of the January 12, 1993 judgment. Recognized authority does not agree with such a conclusion.

> Thus, a court cannot make and enforce rules which are arbitrary, unreasonable, or uncertain in their operation, which deprive a party of the legal or substantive rights, or which are inconsistent with, or contravene principles of general law or constitutional or statutory provisions.

21 C.J.S. Courts § 126 (1990).

Application of the statute of limitations to bar the unadjudicated claims asserted in petitioner's Claims Court Docket No. 103-88C complaint, and reasserted in his Docket No. 94-289C complaint, thus violates the mandates of RCFC 77(j), RCFC 5(c)-(d). And, because Petitioner was denied notice of the January 12, 1993 judgment, application of the statute of limitations also violates the procedural due process rights secured by the U.S. Const. amend. V.: "No person shall ... be deprived of life, liberty, or property, without due process of law ..." [App. 72].

> A fundamental requirement of due process is "the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner.

Armstrong v. Manzo, 85 S.Ct. 1187, 1191 (1965).

Consequently, because petitioner was deprived of notice of the January 12, 1993 judgment, (calculated to apprise him of an opportunity to present his objections as required by the due process clause of the U.S. Constitution), the Court of Federal Claims retained jurisdiction over his continuing unadjudicated claim.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

(3). The "Continuing Claim" And "Equitable Tolling" Doctrines Apply To The Unadjudicated Claims Asserted In Petitioner's Claims Court Docket No. 103-88C Amended Complaint, And Reasserted In His Court Of Federal Claims Docket No. 94-289C Complaint, In Order To Prevent The Respondent From Escaping All Liability For Its Wrongs And Thus "Acquiring A Right" To Continue Its Wrongdoing While Retaining Intact The 6-Year Statute Of Limitations Set Forth By Congress In Section 2501.

(a). Respondent Knowingly Misrepresents The Law Governing The "Continuing Claim" Theory.

Respondent knowingly misrepresented the law governing the "continuing claim" theory during Court of Federal Claims Docket No. 94-289C proceedings. In his October 28, 1994 reply, counsel for respondent (Mr. James M. Kinsella) states:

> The "continuing claim" theory referred to in DeBow has been expressly rejected by the Court of Appeals for the Federal Circuit. Hart v. United States, 910 F.2d 815, 817 (Fed. Cir. 1990). That theory provided that where a continuing duty to plaintiff exists, a new cause of action arises each time the Government breaches that duty. See Mitchell v. United States, 10 Cl. Ct. 63, modified on rehearing 10 Cl. Ct. 787 (1986). See also Sankey, 22 Cl. Ct. at 746-47.

As counsel for respondent in the matter of Hart v. United States, 910 F.2d at 815, attorney Kinsella knows that his statement is false. Contrary to his representation of the law, the Court did not reject the "continuing claim" theory. In fact, Hart v. United States, 910 F.2d at 815, makes no reference to DeBow v. United States, 434 F.2d 1333 (1970). Instead, the Court concluded that the particular facts presented in Hart, 910 F.2d at 815, did not constitute a "continuing" claim:

> Because all events necessary to her benefits claim had occurred when her husband died, we conclude that plaintiff's claim for SBP annuity benefits is not a "continuing" claim.

Hart, 910 F.2d 815 at 818 (emphasis added).

The trickery and deceit of respondent's representation of the law is further exposed by a June 10, 1994, decision of the Court of Appeals. Instead of rejecting the "continuing claim" theory, the decision expressly defines the theory by applying it to a factual situation exemplified by Hart, 910 F.2d at 815.

> The continuing claim doctrine involves a series of distinct events pleaded to the court as a single overall event spanning many years. For example, in Hart v. United States, 910 F.2d 815 (Fed. Cir. 1990), the Government did not notify a wife that her husband had elected to eschew participation in the Survivor Benefit Plan. Ms. Hart filed suit more than six years after her husband's death. The Claims Court determined that each month the Government did not pay Ms. Hart was a new claim for that month's sum. Hart, 910 F.2d at 818. Together, according to the Claims Court, these Government actions constituted a continuing claim. Thus, the trial court avoided the statute of limitations bar. Because "all events necessary to [Ms. Hart's] benefits claim had occurred when her husband died," this court reversed. Id.

Applegate v. United States, 25 F.3d 1579, 1583-84 (Fed. Cir. 1994) (emphasis added).

The Court of Appeals further defined the "continuing claim" doctrine by adopting standards directed by this Court:

> The Supreme Court set forth standards for accrual in cases alleging takings of a continual nature. United States v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947).

Applegate v. United States, 25 F.3d at 1581.

This Court also articulated the defining source of a "continuing claim":

> One of the most theory-ridden of legal concepts is a "cause of action." This Court has recognized its "shifting meanings" and the danger of determining rights based upon definitions of a "cause of action" unrelated to the function which the concept serves in a particular situation [citation omitted] ... The source of the entire claim ... is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized.

United States v. Dickinson, 331 U.S. at 748-49, 67 S.Ct. at 1385 (emphasis added).

Pursuant to the standards thus established by this Court, in its June 10, 1994 decision, the Court of Appeals determined that the "continuing claim" theory does not require the:

> [R]esort to piecemeal or premature litigation to avoid operation of the statute of limitations. [Citation omitted] ... If suit must be brought ... other contingencies would be running against him -- for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim ... is not a single event; it is continuous. Dickenson, 331 U.S. at 749, 67 S.Ct. at 1385.

Applegate v. United States, 25 F.3d at 1581-82 (emphasis added).

In a November 3, 1993 decision, the Court of Federal Claims clarified the prevailing "continuing claim" doctrine with its conclusion: "'continuing wrongs' which, under the continuing claim doctrine, each give rise to a new running of the statute of limitations." Tabbee v. United States, 30 Fed.Cl. 1, 5 (1993).

The Court of Appeals has approved application of the "continuing claim" doctrine in order to prevent the respondent from escaping all liability for its wrongs and thus "acquiring a right" to continue its wrongdoing through application of the statute of limitations:

> The rationale underlying the "continuing claim" doctrine ... is that it prevents the defendant from escaping all liability for its wrong and thus "acquiring a right" to continue its wrongdoing, while retaining intact the 6-year statute of limitations set forth by Congress in section 2501. See Mitchell v. United States, 10 Cl. Ct. 787, 788 (1986), modifying, 10 Cl. Ct. 63 (1986).

Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1581 (Fed. Cir. 1988).

Application of the doctrine of equitable tolling has also been approved by this Court: "Statutes of limitations in actions against the Government are subject to the rebuttable presumption of equitable tolling applicable to suits against private defendants." Irwin v. Veterans Administration, 498 U.S. 89-90 (1990).

In a 1992 decision, the Claims Court provides a summary of examples where this Court and the Court of Appeals have approved application of the equitable tolling doctrine:

> [W]here the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period; Burnett v. New York Central R.R. Co., 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965), or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959). The Federal Circuit ... implied the statute of limitations can be tolled where the Government fraudulently or deliberately conceals facts relevant to a plaintiff's claim so that plaintiff is unaware of their existence and could not have discovered the basis of the claim. Welcker v. United States, 752 F.2d 1577, 1580 (Fed.Cir.), cert. denied, 74 U.S. 826, 106 S.Ct. 83, 88 L.Ed.2d 68 (1985).

Glick v. United States, 25 Cl.Ct. 435, 440 (1992).

Accordingly, the Court of Appeals expressly recognized that the statute of limitations is subject to equitable tolling:

> [A] claim "first accrues" when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action. (Citation omitted) However, despite the apparent unavailability of waiver or estoppel, the statute of limitations can be tolled in proper circumstances, even in suits against the government. (Citation omitted) (equitable tolling due to defendant's fraudulent concealment "is read into every federal statute of limitation") (citations omitted).

Hopland Band of Pomo Indians v. United States, 855 F.2d at 1577.

The Court of Appeals recently clarified the circumstances that will permit application of the doctrine of equitable tolling:

> Statutes of limitations sometimes expressly provide that under specified circumstances the running of the statute is suspended, or tolled. (Footnote omitted) Even if there is no express tolling provision applicable, courts may when circumstances require invoke the concept of tolling as an equitable matter. (Footnote omitted) As was explained in Japanese War Notes Claimants Ass'n v. United States: In certain circumstances the running of the statute will be suspended when an accrual date has been ascertained, but plaintiff does not know of his claim. Ignorance of rights which should be known is not enough.... Plaintiff must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence, or it must show that its injury was "inherently unknowable" at the accrual date.

The Catawba Indian Tribe v. United States, 982 F.2d 1564, 1571 (Fed. Cir. 1993).

This petition involves a situation where, prior to its November 23, 1988 stipulation, respondent intentionally concealed the fact that petitioner's promotion boards treated him with prejudice because of his status as a Flight Safety Officer. In his letter dated October 17, 1984, the Commandant pledged:

> That we would not let a suggestion of such a destructive event as the alleged "blacklisting" of one of our officers go without further examination should be apparent from the Coast Guard tradition of honor and integrity ...

However, the Commandant concealed the prejudice by reneging on his promise: "I can assure you that an investigation was neither ordered nor conducted." [App. 89]. In its April 29, 1985 memorandum, respondent further affirms its intent to conceal the fact that petitioner was treated with prejudice: "[Petitioners'] unsupported allegations of 'Blacklist' are too vague to overcome the presumption of regularity within the Coast Guard administrative system." [App. 88]. Then during the October 5, 1988 hearing, respondent overtly concealed the prejudice when witnesses repeatedly asserted statutory[2] and regulatory[3] immunity during cross-examination. Based on such facts, the Court of Appeals has determined that application of the doctrine of equitable tolling is particularly appropriate.

> [E]quitable tolling of a statute of limitations is based on the avoidance of penalizing a plaintiff simply because under the circumstances plaintiff did not and could not have known of the facts upon which the claim is based. See Corman, Limitation of Actions, s 11.1 (1991). Particularly is this the case when the facts necessary to know of the harm were intentionally withheld from the plaintiff by the defendant.

The Catawba Indian Tribe v. United States, 982 F.2d at 1572.

The undisputed facts cited in this petition clearly show that; while petitioner's claim involves a single overall event, it is based on a series of distinct and "continuing wrongs" that span many years. Pursuant to the December 18, 1992 order of the Court of Federal Claims, [App. 66-70], petitioner's BCMR Docket No. 40-88(R) application was withdrawn in response to the felonious, "continuing wrongful" conduct[4] of counsel for respondent

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[2] 14 U.S.C. § 261(d). [App. 76].

[3] USCG Personnel Manual, Art. 14-A-10(g)(4) (1981-82). [App. 78].

[4] "Obstruction of proceedings before departments, agencies, and committees ... Whoever ... by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before

(Commander Ronald S. Matthew). Based on that conduct, in its Docket No. 69-93 decision, the BCMR concluded: "Accordingly, it is appropriate to consider the statute of limitations as running from the December 1992 United States Court of Federal Claims decision." [App. 63-64]. However, with their reversal of that conclusion, the Court of Federal Claims and the Court of Appeals improperly permit respondent to avoid any liability for its conduct thereby acquiring "the right" to continue its wrongdoing.

(b). Respondent Is Able To Cause Delay By Using Trickery, Deceit, Felonious Threats, And Disingenuous Representations Of Fact And Law To Induce Pervasive Legal Error.

The history of this case exposes chronic wrongdoing by the respondent. The Court of Appeals vacated the Claims Court Docket No. 103-88C decision after concluding: "The legal error made by the Board and ratified by the Claims Court is pervasive to the history of this case." Arens v. United States, 969 F2d 1034, 1040 (Fed. Cir. 1992). The Court also concluded that the conduct of respondent was: "disingenuous." Id.

Application of the statute of limitations to bar the claims asserted in petitioner's Court of Federal Claims Docket No. 94-289C complaint, permits the respondent to benefit from the delays caused by the pervasive legal error that it was able to induce with felonious conduct and false representations of fact and law during BCMR Docket No. 40-88(R), and Claims Court Docket No. 103-88C proceedings. An examination of the record reveals that the respondent successfully utilized the same trickery and deceit during Court of Federal Claims Docket 94-289C proceedings.

The Docket No. 103-88C decision of the Claims Court expressly acknowledges that the facts are undisputed:

> In the instant case, the parties agree that the record of the administrative proceedings, as filed, presents no facts in dispute and that the instant case is ripe for disposition by a motion for summary judgment.

Arens v. United States, 24 Cl. Ct. 407, 415 (1991).

When there are no facts in dispute, the appropriate standard of review is a settled point: "[A]dministrative determinations on

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any department or agency of the United States ... Shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1505.

questions of law are not final and legal conclusions may receive plenary review." Clay Bernard Systems International LTD. v. United States, 22 Cl. Ct. 804, 809 (1991).

However, the Claims Court ratified the legal errors of the BCMR Docket No. 40-88(R) decision by irreconcilably granting "great deference"[5] to the Board and reviewing the decision on the basis of issues of fact. Despite having its decision vacated due to pervasive legal error, the Claims Court concluded:

> It should be noted that the Federal Circuit's decision, vacating and remanding this court's opinion, did not take issue with the fact finding of this court based on this court's review of the complete record ... [App. 69].

Counsel for respondent claims that decisions of the BCMR are prone to legal error because the tribunal lacks independence: "the BCMR isn't stupid, they know who signs their paychecks, if you prevail ... they'll be looking for new jobs ..." [App. 81]. Counsel specifically details the BCMR's lack of independence. On November 8, 1988, (immediately after petitioner filed an opposition to respondent's motion to file a post-hearing brief and affidavit), Ms. Nancy Battaglia, the "Attorney Advisor" to the BCMR called to inform counsel of the filed opposition and to misinform him that the opposition accused him of "fraud." [App. 79-80]. In response, counsel immediately called petitioner (before he received a copy of the filed opposition). [App. 80]. During the recorded conversation that followed counsel threatened:

> There's no way you can win this thing ... Melvin and Eagan will swear to whatever it takes to shoot you down ... if you continue to play this silly game, I have some ... big guns that I can bring to bear against you. [App. 81].

Commander Matthew also threatened to have petitioner criminally prosecuted: "I have big guns that I haven't used, do you understand? You will end up being a big loser if I use them. You're still subject to the UCMJ ..." [App. 82]. And, he threatened to call petitioner's "employer at the law school" to have him fired from his job. [App. 82]. To emphasize the threat, counsel made it clear that he already knew where petitioner worked and he knew the identity of petitioner's employer. [App. 82]. To legitimize his

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[5] Arens v. United States, 24 Cl. Ct. 407, 414 (1991).

threats, counsel stated that, ex parte, he was told to make the call by Ms. Nancy Battaglia, (the hearing chairperson and the eventual author of the BCMR's final decision). [App. 80].

In response to the threats, on November 14, 1988, petitioner submitted an unconditional withdrawal of his application by informing the BCMR:

> In an attempt to forestall the "big guns" from being brought into play, and to hold off interference with the contractual relationship between applicant and his employer, applicant also plans to abandon the suit filed in the U.S. Claims Court.

The withdrawal was immediately filed by the BCMR as submitted; without question, comment or rejection.

Neither counsel for respondent, Ms. Battaglia, or the BCMR, have ever communicated any reason or purpose for the threats other than the intent to force the withdrawal of application. In fact, during proceedings in the Court of Federal Claims, on page 12 of its September 16, 1994 brief, respondent affirms its motive and intent: "Certainly, [petitioner's] voluntary abandonment of his prior litigation for his own tactical litigation purposes does not ... toll the statute of limitations." (Respondent thereby ratifies and adopts the felonious conduct of Commander Matthew with its claim that the delays caused by his conduct entitle it to the statute of limitations defense).

The fallacious nature of respondent's representations are exemplified by respondent's statements uttered during oral argument (in support of its claim that petitioner withdrew his application to serve "his own tactical litigation purposes"):

> As I indicate, Your Honor, except for [petitioners'] assertions about those phone calls there is no indication any of those threats were made. Commander Matthew vehemently denies having said the things that he was attributed to in that conversation. [App. 32].

The shameless dishonesty of that statement is exposed by the admission of Matthew that he did in fact made the statements attributed to him. After being provided with a recited transcript of his statements, on pages 13-14 of his December 20, 1988, BCMR Docket No. 40-88(R) brief, Matthew admits making the threats:

> The telephone call did take place and Coast Guard Counsel did make the statements attributed to him. ... At the suggestion of the BCMR, Coast Guard Counsel somewhat reluctantly placed the call... [and] initiated the conversation ...

The deceit of respondent's statement that "there is no indication any of those threats were made" is fully exposed on pages 16-17 of its December 20, 1988 brief:

> Coast Guard Counsel did indeed tell [Petitioner] that if [he] continued in this approach that he would bring out some "big guns" ... Coast Guard Counsel went so far as to state that he had such doubts as to [Petitioner's] professional abilities that perhaps his employer at the law school ought to know about it.

Consequently, Commander Matthew has steadfastly refused to execute an affidavit in support the representations made by counsel for respondent during Court of Federal Claims and Court of Appeals proceedings..

The desperation of respondent's desire to dispose of this case (without an adjudication of its merits) is revealed by the documented threats to have petitioner maliciously prosecuted. After the "Blacklist [Petitioner]" directive was issued, [App. 96], and after Commander Matthew threatened to have petitioner prosecuted under the UCMJ, [App. 82], in his June 1, 1993 memorandum, the Chief Counsel threatens:

> [Petitioner] claims to have recorded the telephone conversation. As it is, and was, with limited exceptions, e.g., obtaining a warrant, a violation of Massachusetts law to tape a telephone conversation without permission of all parties, M.G.L.A. c.272 § 99 ...

This threat failed when the Massachusetts Attorney General specifically ruled that the recording did not violate state law. However, respondent's most egregious and desperate threat was exposed by the Connecticut State Attorney General (Mr. Richard Blumenthal):

> And, on Mar. 24, 1993, the Attorney General of the State of Connecticut called to inform [petitioner] that his office was in possession of information describing a plan

> to destroy [Petitioner's] credibility. However, the plan, (involving a specifically named individual hired to plant cocaine in applicant's car, stage an accident, and have him arrested), failed. The 'accident' was avoided and [Mr. Wayne Daley was] arrested.

An investigation of respondent's conduct was requested by The Coast Guard and Navigation Subcommittee of the Merchant Marine and Fisheries Committee. However, the findings cited in the report of the investigation, released by the U.S. Department of Transportation on June 19, 1995, are concealed: "INFORMATION WITHHELD PURSUANT TO 5 U.S.C. 552(b)(7)c."

Like his BCMR Docket No. 69-93 application, petitioner's Court of Federal Claims Docket No. 94-289C complaint is based on judicially admitted facts that are not in dispute. The BCMR decision ratifies promotion board conduct that is arbitrary, capricious, an abuse of discretion, and not in accordance with law[6] in that the boards violated federal law[7] and Coast Guard Regulations[8] by treating petitioner with prejudice expressly because of his status as a Flight Safety Officer. The facts are uncontested, promotion board members expressly admit that petitioner's non-selection was determined by a single predominant factor: "flight safety as a sub-specialty of aviation, most probably was the cause of his failure of selection."[9] The law is also undisputed; the "Criteria For Selection" required by regulations mandates the consideration of a single primary factor: "Professional competence as a Coast Guard officer in a specific field should be of primary significance through the grade of commander."[10] With emphasis added, regulations also prohibit the prejudicial treatment of officers assigned Flight Safety duties: "Each member of the board must retain an impartial, unbiased and unprejudiced attitude regarding all officers being considered and regarding all groups and specialized duties in the Coast Guard."[11] However, as stipulated by

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[6] 5 U.S.C. § 706(2)(A).

[7] 14 U.S.C. § 254. [App. 75].

[8] USCG Personnel Manual, Art. 14-A-1(b) (1981-82). [App. 76-77]. Id., Art. 14-A-4(a). [App. 78]. Id., Art. 14-A-10(d). [App. 78].

[9] Respondent's BCMR Docket No. 40-88(R) Post-Hearing Brief, 24, Nov. 23, 1988.

[10] USCG Personnel Manual, Art. 14-A-3(b)(1)a. [App. 77].

[11] USCG Personnel Manual, Art. 14-A-1(b). [App. 76].

promotion board members Melvin and Eagan, petitioner was passed-over because of his professional competence as a flight safety specialist. Consequently, they used the Criteria For Selection as their personal Criteria For Non-Selection.

In spite of the facts, during oral argument, respondent was able to induce legal error by misrepresenting the admitted conduct of the promotion boards, and by misrepresenting the "Criteria For Selection" mandated by regulations. [App. 77-78].

> Number one, those fitness reports, as I've indicated and set forth in the briefs, are merely one aspect of the matters before the Court in determining whether an applicant is to be promoted. Other matters include experience, letters of recommendation, basically the personnel file. In any event, those matters are also a competitive analysis based on other applicants.

(c). Respondent Successfully Causes The BCMR And The Court To Apply An Improper Burden Of Proof By Misrepresenting Petitioner's Claim As Being "A Conspiracy Allegation."

Respondent's ability to induce legal error was also served by its strategy to trick and deceive the BCMR and the Court by misrepresenting petitioner's claim as being a "conspiracy allegation." An electronic word search of the record shows that petitioner scrupulously avoided making any "conspiracy allegations" because such a characterization would create the illusion that his cause of action is based on issues of fact. And, that characterization would consequently cause the application of an improper burden of proof.

The word search also reveals that the conspiracy characterization was actually initiated by the respondent as a rephrasing of its "blacklist" directive.[12] Then, during subsequent BCMR and Claims Court Docket No. 103-88C proceedings, respondent purposefully induced the adoption its contrived theory. While the respondent forcefully argued that the Court should ratify the BCMR's adoption of the conspiracy theory, petitioner objected on the basis that the existence, or non-existence, of a conspiracy was irrelevant because the facts were not in dispute: the promotion

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[12] "[S]omeone in a position of trust in the Coast Guard had removed from official files ... [the 'Blacklist Arens' directive] ... marked 'For Official Use Only'. ... I [do not] accept even the remotest possibility of such a conspiracy existing, let alone succeeding." Coast Guard Commandant letter dated October 17, 1984.

boards admitted that petitioner was treated with prejudice because of his status as a Flight Safety Officer. As stated in paragraph 76 of petitioner's July 7, 1989 brief: "The [BCMR ...] decision is contrary to the law because plaintiff does not have the legal burden of proving [the existence of a] 'conspiracy' ..."

The objection was overruled. Thus, respondent was able to sustain the illusion that petitioner's cause of action is based on issues of fact. Therefore, by inducing ratification of the bogus "conspiracy theory," respondent was able to persuade the Court to give "great deference" [13] to the findings of the BCMR.

Even though the Court of Appeals expressly recognized respondent's disingenuous conduct, the success of its strategy during earlier Claims Court proceedings prompted the renewal of that strategy during proceedings in the Court of Federal Claims. On pages 3-5 of its July 5, 1994 motion, respondent again falsely quotes: "[Petitioner's] conspiracy allegations ..." Respondent further emphasizes its deceit by repeating the bogus allegation no less than six times. Then, on pages 5-6 of its motion, respondent argues that the Court should once again give great deference to the BCMR decision by re-ratifying its fabricated theory:

> This Court held that [petitioner] had not submitted convincing evidence to support his allegations of a conspiracy ... Accordingly, this Court concluded that [petitioner] had failed to establish that the decisions of the ... promotion boards were arbitrary, capricious, in bad faith, or lacked rational basis.

Incredibly, respondent claimed that its use of the fabricated "conspiracy allegation" is permissible because it induced the Court to ratify the theory during Docket No. 103-88C proceedings: "Your Honor, the Court itself used that term." [App. 37].

In its Docket No. 103-88C opinion, the Claims Court acknowledges that its ratification of the conspiracy characterization was the determining factor in its decision: "In this case, the burden was on the plaintiff to prove the existence of the alleged conspiracy and to establish clearly in the record that he was improperly treated." Arens v. United States, 24 Cl. Ct. 407, 417 (1991).

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[13] Arens v. United States, 24 Cl. Ct. at 414.

On appeal, the Court of Appeals addressed the incongruity of that conclusion when measured against the findings cited in the Docket No. 40-88(R) Final Decision of the BCMR:

> [T]he documentary evidence presented by Mr. Arens in the case raised, on its face, a "serious question of Coast Guard propriety" and found that Captain Roy had indeed written the "7/23 memorandum" which purported to assign Captains Melvin and Eagan to Arens' promotion boards. However, despite these findings, the board determined that no causal connection existed between the 7/23/80 memorandum and Arens' failure to be selected and further found that the "blacklist" notation proved to be inconclusive since there was no indication of an address or record of who might have seen it because Captain Roy testified that no blacklist existed as to Arens
>
> ...

Arens v. United States, 969 F2d 1034, 1036 (Fed. Cir. 1992) (emphasis added).

X. CONCLUSION

The Docket No. 95-5095 Judgment of U.S. Court of Appeals for the Federal Circuit improperly affirms the Docket No. 94-289C decision of the U.S. Court of Federal Claims. The affirmed Court of Federal Claims decision interprets and applies the statute of limitations in a manner that conflicts with stare decisis and relevant decisions of this Court. The affirmed decision also relies on a judgment that is void (due to the fact that the judgment was not filed and served as required by the Rules of the Court). And, the decision of the Court of Federal Claims fails to properly recognize the "continuing claim" and "equitable tolling" doctrines.

Respectfully submitted

Gerald F. Arens (Date signed: April 23, 1996)
71 Parker St.
East Longmeadow, MA 01028
(413) 525-3156

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

95-5095

GERALD F. ARENS, Plaintiff-Appellant,

v.

THE UNITED STATES, Defendant-Appellee.

NOTICE OF ENTRY OF JUDGMENT WITHOUT OPINION
ENTERED: 12/06/95

The judgment of the court in your case was entered today pursuant to Rule 36. This Court affirmed the judgment or decision that was appealed. None of the relief sought in the appeal was granted. No opinion accompanied the judgment. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Appellant(s) in favor of the Appellee(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

cc: GERALD F. ARENS
ELIZABETH A. RINALDO

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

95-5095

GERALD F. ARENS,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Judgment

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

CASE NO(S). 94-298C

This CAUSE having been heard and considered it is

ORDERED and ADJUDGED:

Per Curiam: (MAYER, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and MICHEL, Circuit Judge):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED DEC 6 1995

S/ Francis X. Gindhart
Francis X. Gindhart, Clerk

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

GERALD F. ARENS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 94-289C**
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

Courtroom 8, Room 512
National Courts Building
717 Madison Place, N.W.
Washington, D.C.

March 29, 1995

The parties met, pursuant to the notice of the Judge, at 10:03 a.m.

BEFORE: HON. KENNETH R. HARKINS
Senior Judge

APPEARANCES

For the Plaintiff:

GERALD F. ARENS, ESQ., Pro Se
71 Parker Street
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(413) 525-3156

For the Defendant:

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(202) 307-1011

LEX MILLARD, ESQ.
U.S. Coast Guard

PROCEEDINGS

THE COURT: Good morning.

MR. SHOLAR: Good morning, Your Honor.

MR. ARENS: Good morning, Your Honor.

THE COURT: The United States Court of Federal Claims is in session to hear oral argument in the case of Gerald F. Arens vs. The United States, Court of Federal Claim 94-89C.

Plaintiffs is represented by Mr. Arens, pro se; is that correct?.

MR. ARENS: Yes, sir.

THE COURT: Thank you. And Defendant is represented by J.P. Sholar?

MR. SHOLAR: Yes, Your Honor.

THE COURT: Do I pronounce it right?

MR. SHOLAR: Yes, Your Honor, you did.

THE COURT: And you are accompanied by?

MR. SHOLAR: Mr. Lex Millard, counsel for the United States Coast Guard, Your Honor, who appears on the briefs.

THE COURT: A11 right. Before we start the argument I will identify on the record the papers that are relevant to the argument. First, there's the complaint filed May 5, 1994.

The next paper is captioned "Administrative Record of Document 69-93, Proceedings before the United States Department of Transportation Board for the Correction of Military Records." This is filed on the Plaintiff's, pursuant to Plaintiff's motion on June 20, 1994.

The next paper is Defendant's motion to dismiss filed July 5, 1994.

Next is Plaintiff's response to Defendant's motion to dismiss and cross motion for summary judgment filed July 20, 1994. Accompanying that response and cross motion Plaintiff filed an appendix on July 20, 1994. And Plaintiff also filed Plaintiff's statement of facts on July 20, 1994.

Next we have Defendant's reply in support of its motion to dismiss, response to Plaintiff's cross motion for summary, and motion for summary judgment. This is filed September 16, 1994.

And accompanying that motion, reply, response and cross motion was Defendant's statement of facts filed September 16, 1994. Also, Defendant's counterstatement of facts filed September 20, 1994.

The next paper is the administrative record which was filed pursuant to Defendant's motion. It was filed September 22, 1994. This is a certified true copy by the Chairman, Board of Correction of Military Records, Office of the General Counsel, Department of Transportation.

And next we have reply in support of Plaintiff's cross motion for summary judgment and response to Defendant's motion for summary judgment filed October 17, 1994.

Next we have Defendant's reply in support of its motion for summary judgment and motion to dismiss. This is filed November 1, 1994.

There is pending an additional paper that's captioned Plaintiff's motion to strike Defendant's reply in support of its motion for summary judgment and motion to dismiss. And this motion of Plaintiff was filed on November 14, 1994.

Before we dispose of the pending motion or go into the arguments I want to clarify on the record Plaintiff's pro se status. We have a footnote in the prior proceeding in this court that states that, footnote 1 says, "Although the Plaintiff Gerald Arens filed his papers pro se, Mr. Arens is in fact an attorney."

Is that a correct statement?

MR. ARENS: Yes, sir. Not in this jurisdiction, however.

THE COURT: Are you a member of a bar?

MR. ARENS: Yes, Your Honor, I am. I am a member of the Connecticut Bar Association.

THE COURT: Connecticut. And are you in practice?

MR. ARENS: Yes, Your Honor.

THE COURT: Now, you're also a retired lieutenant commander; is that right?

MR. ARENS: Yes, Your Honor.

THE COURT: How long -- What was your length of service?

MR. ARENS: Just short of 21 years. As I recall it's about 20 years and 6 months.

THE COURT: So you have a full retirement?

MR. ARENS: Yes, Your Honor, I do.

THE COURT: All right. First we'll deal with Plaintiff's motion to strike Defendant's reply in support of its motion for summary judgment and motion to dismiss. It says here, fails to comply with the rules of the court and that it is based on redundant, immaterial, impertinent and scandalous matter.

Does Defendant wish to respond to this motion?

MR. SHOLAR: Yes, Your Honor. The Government was under the impression that the Court had already denied that motion to strike.

THE COURT: Oh, no. We've got several problems here. We've also denied a motion to reconsider another - -

MR. SHOLAR: Yes, Your Honor.

THE COURT: -- order. I should have identified these orders, I suppose, when I identified the relevant papers.

First we have an order dated September 7, 1994 which is a scheduling order, a briefing schedule.

Next we have an order on October 17, 1994, which concerns a request for motions for reconsideration on the September 7 order.

And also a corrected motion for leave to file first amendment of Plaintiff's motion for relief. And this order also set up a briefing schedule.

And the next order is ordered November 10, 1994. And that was based on -- recites that we had Plaintiff's motion to strike Defendant's response to Plaintiff's motion for relief, motion for reconsideration of the September 7 order of the Court which had

been filed on November 4, and Defendant's response to Plaintiff's motion for relief and motion for reconsideration of the September 7, 1994 order of the Court filed October 31.

The Plaintiff's motion to strike Defendant's response to Plaintiff's motion for relief is denied.

Plaintiff's motion for reconsideration of the December 7, 1994 order of the Court was denied.

All briefing on the response to motions is now complete and oral argument thereon will be scheduled by separate order.

And that was the order of November 10. And on November 14 is when Plaintiff filed his motion to strike Defendant's reply, which was filed on November 1. Defendant's reply was filed on November 1 and Plaintiff's motion to strike Defendant's reply was filed on November 14. So there's been no ruling as of yet - -

MR. SHOLAR: Correct, Your Honor.

THE COURT: -- Plaintiff's November 14, 1994 motion. And that is what we are in the process of doing at this time.

MR. SHOLAR: Correct, Your Honor. I guess in the flurry of papers back and forth I hadn't realized that the motion to strike was filed after the order setting this hearing.

THE COURT: Right.

MR. SHOLAR: But in any event, Your Honor, as your summation of the pleadings or the papers filed in this case indicates, this, the initial motion filed was the Government's motion to dismiss on jurisdictional grounds, which we still maintain, we believe that has to be addressed as a first matter before the Court reaches the merits.

Mr. Arens then responded with his own cross motion for summary judgment prompting the Government, since the merits were in front of the Court, to then file in the alternative to its motion to dismiss its own motion for summary judgment on the basis of the administrative record before the Board and response to Mr. Arens cross motion for summary judgment.

The reply is submitted in support of the Government's motion for summary judgment in response to Mr. Arens' response to our motion as is called for by the rules.

And with respect to Mr. Arens' assertion concerning the matters stated therein, the motion, our reply, Your Honor f simply speaks for itself and we would rely upon it as to the matters that it addresses. It simply addresses the matters raised in Mr. Arens' response, previous response to our motions. Many issues have been raised which we would contend go to numerous matters that have been at issue both in the prior litigation of this case and in this case in various pleadings throughout this matter, it being unclear to me which motion pending Mr. Arens is asserting those matters respond to which properly under the rule we're entitled to reply to those matters as they were addressed. And that's what the basis of our reply consists of.

And, certainly, Your Honor, simply on its face that there's no scandalous matter asserted therein. It simply replies to matters addressed by Mr. Arens in his pleadings based upon the assertions made by Mr. Arens and based upon the matters before the board.

THE COURT: Does Mr. Arens have anything he wishes to add to his motion?

MR. ARENS: Yes, Your Honor, I do. I think this issue can be disposed of quite easily under the rules in that according to the rules Defendant waived all of their defenses other than the motion to dismiss on the basis of jurisdiction because in their answer they failed to deny the allegations in the complaint as required by Rule - -

THE COURT: What answer are you talking about?

MR. ARENS: In their initial response to the complaint the answer had to be filed within 60 days under the rules.

THE COURT: And you didn't file an answer. You hadn't filed an answer yet.

MR. ARENS: No, they didn't file an answer yet

THE COURT: But they moved to dismiss.

MR. ARENS: They submitted a motion to dismiss but they still haven't answered. And under the rules - -

THE COURT: So what difference does that make if you've got a motion to dismiss?

MR. ARENS: As I read Rule 12 it says, "The United States...", Rule 12(A), "The United States shall file its answer to the complaint within 60 days after the service of the pleading in which the claim is asserted."

And then 12(B) states, how presented, "every defense in law or fact to a claim for relief in any pleading, whether the claim, counterclaim or third party claim, shall be asserted in the responsive pleading thereto."

THE COURT: Well, it says on further that - -

MR. ARENS: "Except for lack of..." - -

THE COURT: -- ''except that the following defenses may at the option of the pleader be deemed a motion. 1) lack of jurisdiction of the subject matter; 2) lack of jurisdiction of the person; 3) insufficiency of process; 4) failure to state payment along with relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted."

So you're just wrong as far as saying that they had -- they've made an answer, and their failure to make an answer is under the rules is something that they can be criticized about.

MR. ARENS: Yes, sir. In the motion to strike I also claim that the response should have been stricken based on an improper extension of time, that there was some misrepresentations made by Defendant.

THE COURT: Which are you, which motion to strike are you talking about?

MR. ARENS: Defendants filed a motion for an extension of time.

THE COURT: And that is the, was the basis of the ruling that was finally made on September or 11/10/94.

MR. ARENS: Yes, Your Honor. I have no additional argument on those points.

THE COURT: All right. Then I think you're correct in saying you have no additional argument because there is the confusion in the amount of paperwork generated on this kind of a process. First of all, Plaintiff's November 14, 1994 motion to strike Defendant's

reply to support its motion for summary judgment motion. This is denied.

And particularly it's denied as to any part of it that asserts a basis for denial as a result of a violation of Rule 11. Looks to me, frankly, what your motion to strike is is an attempt to evade our rules 56.1(b) and 85 or 83.2. What you're trying to do is file an additional brief. That is not permitted by the rules. I'm going to allow this to be filed. I'm going to consider as an additional brief that you've submitted in support of your claim. But it's not a -- the motion to strike is denied.

And so we'll have Defendant's November 1, 1994 reply in the record. And you'll have your motion to strike which is treated as an additional brief and a response to that, to Defendant's November 1, 1994 reply. So that, what this does is make Plaintiff's motion to strike Defendant's reply in support of its motion for summary judgment and a motion to dismiss a paper relevant to the argument that is to be made.

Now, the order of argument, we have cross motion for summary judgment, we have a motion to dismiss, and then we have a cross motion on Plaintiff's -- The order as presented in time, Defendant's motion to dismiss, Plaintiff's response and cross motion for summary judgment, and then Defendant's reply, and a motion for summary judgment, and so on. So the way I'm going to solve this, Plaintiff will go first. Defendant will go second. Plaintiff will then make a rebuttal. And then Defendant can make a rebuttal. And there's no time limit. You can say anything you need to protect the interests of your side. And when it's all through we'll have a record, hopefully, that can be resolved.

Mr. Arens, you may proceed.

MR. ARENS: Yes, Your Honor. When I got the telephone call from your secretary I had asked about the procedure in the Court, the order of oral argument and the procedure. And she indicated to me that there was no set rule. And I talked to the Clerk and he said there was no set rule.

So what I, I structured my oral argument on the Connecticut practice. And in the Connecticut practice it's common in oral argument to present the Court and an opposing outline with a minimum of an outline of the oral argument with citations thereto.

THE COURT: I don't need additional papers. You proceed.

MR. ARENS: Yes, Your Honor.

On June 30, Plaintiff was involuntarily retired from the U.S. Coast Guard after having been passed over by promotion boards that were convened on October, in October of 1991 and October of 1992.

On August 4, 1984 Plaintiff received an unsolicited package concerning several hundred documents from the Chief of Aviation Safety Programs at Coast Guard Headquarters. The documents, stamped: "Official Use Only" included an "Office of the Commandant Correspondence/Action Sheet" containing the directive "Blacklist Arens". Also included was a July 23, 1980 memorandum authored by the Deputy Chief of Staff. Defendant calls this document a "stacking memo" because it designates Captain Robert Melvin and Captain Lance Eagan for membership on Plaintiff's 1981 and 1982 promotion boards.

In its November 23, 1988 post-hearing brief Defendant admits that as members of the promotion boards Captain Melvin and Captain Eagan treated Plaintiff with prejudice because of his status as a flight safety officer. Based on this admission, Plaintiff claims that the promotion boards acted arbitrarily, capriciously, and unlawfully because their prejudicial conduct violated federal law and Coast Guard regulations.

However, with its Docket Number 69-93 final decision the Department of Transportation Board for Correction of Military Records, or BCMR, sustained the conduct of the promotion boards. This case has been field as a petition for review of that decision.

Defendant claims that Plaintiff's cause of action is barred by the statute of limitations. Defendant also claims that the BCMR decision was rendered in accordance with the law.

Plaintiff's BCMR Docket Number 69-93 application was previously adjudicated as BCMR Docket Number 40-88(R) and reviewed as Claims Court Docket Number 103-88C.

With its opinion, the Claims Court affirmed the earlier BCMR decision. However, those decisions were vacated by the Court of Appeals for the Federal Circuit after it determined that "The legal

error made by the Board and ratified by the Claims Court is pervasive to the history of this case."

The Appellate Court also concluded that Defendant's representations of fact and law were "disingenuous."

Based on four separate legal theories, Plaintiff's claim is not barred by the statute of limitations.

Pursuant to 28 U.S.C. § 2051, "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

Section 2401(a) parallels section 2501 and provides in pertinent part that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

Defendant will properly argue that the 6-year statute of limitations must be strictly construed. However, based on Plaintiff's first legal theory, the statute does not bar his continuing unadjudicated claim which was originally filed as Claims Court Docket No. 103-88C.

On March 27, 1989, Plaintiff amended his Docket Number 103-88C Claims Court complaint. Count 15 of the complaint states the identical claim currently before this Court. But for the legal errors induced by Defendant's disingenuous representations of fact and law during those proceedings, we would not be here today. Because this Court consequently failed to adjudicate Plaintiff's claim it has retained jurisdiction over that claim.

THE COURT: Well, wait a minute. Wasn't the prior Court of Claims proceeding, that would be the decision that was rendered in Docket Number 103-88C.

MR. ARENS: The last, that --

THE COURT: That was the, that was your initial first case in the Claims Court.

MR. ARENS: Yes, Your Honor. The last --

THE COURT: When you had a judgment there the judgment in that case 103-88C filed July -- January 12, 1993, says, "It is further ordered and adjudged that jurisdiction is not retained by the

further ordered and adjudged that jurisdiction is not retained by the Court in this case."

MR. ARENS: Yes, Your Honor. Defendant cited that in his, he cited that document in his pleadings.

THE COURT: Was this the judgment?

MR. ARENS: Your Honor, the last, the last order I received from the Claims Court was December 18, 1972, which was --

HE COURT: Are you saying, are you charging our Clerk with failing to mail this to you?

MR. ARENS: Well, I investigated, Your Honor. And at the time, at about that time there was a mail carrier in our local carrier who was arrested for burning mail instead of delivering it. After I received Defendant's pleadings. Now, I do not know whether or not, and I haven't stopped down to the Clerk.

THE COURT: If somebody stole the letter or a mail clerk or the Postal Service didn't deliver it does that have any bearing on whether there was a judgment?

MR. ARENS: No. Not as a -- No, Your Honor, it surely does not.

THE COURT: And you offered to dismiss your case in the Claims Court, your previous case when you were in the -- got in the federal circuit. You made that offer that you would dismiss; isn't that correct?

MR. ARENS: Not specifically. But, Your Honor, I will concede that this, that my first theory has failed. I will concede that. I will concede that the fact that I --

THE COURT: That you don't have a continuing claim, is that what you're saying?

MR. ARENS: Based on I have other arguments to support the continuing claim theory.

THE COURT: I see. All right, go ahead. There's no question, though, that the judgment of this court was that it did not have jurisdiction of the complaint that was addressed in Docket Number 103-88C?

January 1993 order of the Court and I have no reason to disbelieve. But when I received the original decision from the Claims Court it was sent by Registered Mail and I had to sign for it. Now, apparently this last order there was no return receipt signature required. So that's another reason why.

THE COURT: I'm surprised that they send the opinion out --

MR. ARENS: The October 31, 1991 decision was sent return receipt. And I remember very specifically having to sign for it.

Shall I continue, Your Honor?

THE COURT: Go ahead.

MR. ARENS: Based on Plaintiff's second legal theory, under the continuing claim doctrine each of Defendant's continuing wrongs give rise to a new running of the statute of limitations.

This Court specified in its November 3, 1993 decision in *Tabbee v. The United States*, 30 Cl Ct. 1, at page 5, that it has continuing jurisdiction based on, "'continuing wrongs' which, under the continuing claim doctrine, each give rise to a new running of the status of limitations."

Therefore, this Court must not be deceived by the representations of law stated in footnote 2 of Defendant's October 28, 1994 brief. "The 'continuing claim' theory has been expressly rejected by the Court of Appeals for the Federal Circuit, *Hart v. United States*, 910 F.2d 815, 817 (Fed. Cir. 1990)."

Your Honor, in the pleadings Mr. James Kinsella and Mr. John Sholar were both named as Defendant's counsel.

As counsel for Defendant in *Hart v. United States* Mr. Kinsella knows that the Court of Appeals did not reject the continuing claim theory. Instead, the Court expressly concluded that the particular facts presented in that case did not constitute a continuing claim.

Mr. Kinsella's lack of respect for this Court is further exposed in a June 10, 1994 decision of the Court of Appeals. Instead of expressly rejecting the "continuing claim" theory, the Court actually defines the theory by citing *Hart* as precedent in *Applegate v. United States*, 25 F.3d 1579 (Fed.Cir. 1994).

ally defines the theory by citing *Hart* as precedent in *Appleqate v. United States*, 25 F.3d 1579 (Fed.Cir. 1994).

Defendant's continuing wrongs include the feloniously coerced withdrawal of Plaintiff's BCMR Docket Number 40-88(R) application.

Title 18 U.S.C. § 1505 provides in pertinent part, "Whoever by any threatening communication obstructs, or impedes the due and proper administration of law before any department or agency of the United States shall be fined not more than $5,000 or imprisoned not more than five years, or both."

During BCMR Docket Number 40-88(R) proceedings, on February 17, 1988, Plaintiff filed Docket Number 103-88C complaint in the U.S. Claims Court duplicating the allegations contained in the BCMR application. Twelve days later, on February 29 Plaintiff filed a motion to stay Claims Court proceedings pending a decision by the BCMR. This motion was granted.

On October 5, 1988, the BCMR conducted a Special Oral Hearing on Plaintiff's application.

On November 4, 1988, Coast Guard Counsel Commander Ronald S. Matthew filed a "Motion to File a Post-Hearing Brief" and affidavit of Captain Eagan. This motion falsely certified that a copy was delivered to Plaintiff before the October 5 hearing.

On November 8, 1988 Plaintiff filed a motion opposing Defendant's motion to file the affidavit based on the express prohibition of 33 CFR § 52.35-l(c) which states that "in any case in which a hearing has been held, the Board may not accept documentary evidence after the hearing." Defendant's motion was granted.

In response to Defendant's motion, on November 8, 1988, Commander Matthew called Plaintiff and threatened to utilize the "big Guns" of the Federal Government to have him criminally prosecuted and fired from his job if he continued to press his claim. To emphasize his threats, Commander Matthew made it clear that he already knew where Plaintiff worked and he knew the identity of Plaintiff's employer. To legitimize his threats, Commander Matthew stated that, ex parte, he was told to make the call by the Hearing Chairperson and eventual author of the Board's final decision, Ms. Nancy Battaglia.

expressly acknowledged the resulting failure to exhaust administrative remedies and the consequential abandonment of Plaintiff's Docket Number 10388C Claims Court suit.

Nine days later, in his November 23 post-hearing brief, Coast Guard Counsel stipulated that Captain Melvin and Captain Eagan admitted that Plaintiff's specialty, flight safety, "most probably was the cause of his failure of election."

Two months later, on January 26, 1989, without solicitation, Mr. B. Wayne Vance, General Counsel for the Department of Transportation, intervened with a written pledge that he would not permit Defendant's conduct to delay or interfere with federal court proceedings.

On page 12 of its September 16, 1994 reply, Defendant adopts and embraces the felonious conduct of Commander Matthew with its argument, "Certainly, Mr. Arens's voluntary abandonment of his prior litigation for his own tactical litigation purposes does not toll the statute of limitations." Defendant thus claims that this court should apply the statute of limitations in order to permit it to benefit from the felonious conduct of Commander Matthew.

Defendant's argument cannot be reconciled with the legal reality that the withdrawal of application automatically concluded all litigation because Plaintiff thereby failed to exhaust his administrative remedies, a jurisdictional prerequisite.

However, on February 10, 1989, a two-member BCMR published its final decision denying all relief sought in Plaintiff's Docket Number 40-88(R) withdrawn application. This decision served to exhaust Plaintiff's administrative remedies.

Then, relying on General Counsel Vance's restated pledge of non-interference, on March 27, 1989, Plaintiff amended his Claims Court petition to include a claim that the BCMR ratified prejudicial conduct by Plaintiff's promotion boards in violation of federal law and service regulations.

On October 31, 1991, the Claims Court rendered its Docket Number 103-88C decision granting Defendant's Motion for Summary Judgment without addressing Plaintiff's claim.

On October 31, 1991, the Claims Court rendered its Docket Number 103-88C decision granting Defendant's Motion for Summary Judgment without addressing Plaintiff's claim.

On appeal, on July 8, 1992, the court of Appeals vacated the Claims Court decision after finding that, "The legal error made by the Board and ratified by the Claims Court is pervasive to the history of this case."

Incredibly, on pages 12 and 13 of its September 16, 1994 reply, Defendant argues, "there is no indication by Mr. Arens that any action by the government tricked or misled Mr. Arens into allowing a filing deadline to pass." Defendant thus claims that the interference, obstruction, and delay caused by the felonious conduct of Commander Matthew did not induce a filing deadlines to pass.

Defendant also reneges on the promise of the General Counsel with its request that this Court validate the delaying tactics of Commander Matthew by applying the statute of limitations.

The fundamental principles behind the statute of limitations would be grossly perverted if the Court ratifies Defendant's conduct by permitting it to avoid a sustainable review of Plaintiff's claim. The logic behind the statute is stated by this Court in *Homcy v. United States*, 536 F.2d 360, at page 364, (1976):

"A crucial purpose of limiting actions is to put opponent on notice in order that he may preserve his defenses."

In this case, Defendant was in possession and control of the record. And because Defendant was put in notice it therefore had the burden of preserving that evidence.

Ten years ago, Plaintiff put Defendant on notice and pleaded for it to preserve its defenses. In a May 13, 1985 letter, Plaintiff advised the Commandant that he would willingly forgo all personal remedies requested in his BCMR application if the Coast Guard would investigate the "Blacklisting" directive. However, even after being advised that the issue would be litigated in federal court if not investigated, Plaintiff's offer was rejected. Ironically, in his Claims Court Docket Number 103-88C petition, Plaintiff pleaded for application of the equitable doctrine of laches to the defenses that the Defendant failed to investigate and preserve.

Appeals in *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, at page 1581, (Fed.Cir. 1988). "The rationale underlying the 'continuing claim' doctrine is that it prevents the defendant from escaping all liability for its wrong and thus 'acquiring a right' to continue its wrongdoing, while retaining intact the 6-year statute of limitations set forth by Congress in section 2501."

With its December 18, 1992 Order, this Court voided all prior BCMR action on Plaintiff's application. Based on that order the BCMR concluded in its Docket Number 69-93 decision, "... it is appropriate to consider the statute of limitations as running from the December 1992 United States Court of Federal Claims decision."

Based on Plaintiff's third legal theory, the doctrine of equitable tolling suspended Plaintiff's cause of action until he received a copy of Defendant's November 23, 1988 post-hearing brief.

In its brief, for the very first time Defendant admitted that the promotion boards treated Plaintiff with prejudice because of his status as a Flight Safety Office. Before November 23, 1988, Defendant concealed, and Plaintiff was denied the opportunity to discover, the prejudicial conduct.

Prior to that date, Defendant's singular defense is stated in its April 29, 1985 position paper, "LCDR Arens' unsupported allegations of 'Blacklist' are too vague to overcome the presumption of regularity within the Coast Guard administrative system. Therefore, this office will not present an opinion concerning this matter."

Defendant also denied Plaintiff the opportunity to discover the prejudicial conduct of the promotion boards. At the October 5, 1988 hearing, Defendant failed to produce requested witnesses as required by the Supreme Court in *Williams v. Zuckert*, 371 U.S. 531 (1963). And that decision states on page 533, "Upon proper and timely request to produce the requested witnesses, since they were readily available and under the service's control." Then during the hearing itself, Defendant overtly concealed the prejudicial conduct by repeatedly asserting the sustained privilege, the sustained privilege of statutory and regulatory immunity.

The statute of limitations is suspended in these situations because Defendant's conduct prevents discovery of necessary facts. This Court stated the doctrine of equitable tolling in *Glick v United*

The statute of limitations is suspended in these situations because Defendant's conduct prevents discovery of necessary facts. This Court stated the doctrine of equitable tolling in *Glick v United States*, 2 Cl. Ct. 435 at page 440 (1992), "Equitable tolling permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim."

Based on Plaintiff's fourth legal theory, the statute of limitations was also suspended by the "half-a-legal-loaf" doctrine.

Application of the doctrine has been approved by this Court in *DeBow v. United States*, 193, Ct.Cl. 499 (1970), and its progeny. The defense to application of the doctrine relies solely on the false statement of Mr. Kinsella and Mr. Sholar in paragraph 6 of their State of Facts that Plaintiff's BCMR Docket Number 279-84 application, "was denied by a decision dated October 14, 1987."

The Court must not be deceived by Defendant's misrepresentation. By specifically ordering the correction of Fitness Reports altered during proceedings of the 1981 promotion board, the BCMR decision directly contradicts Defendant's statement. The relief actually ordered entitles Plaintiff to application of the "half-a-legal-loaf" doctrine.

I will now address the issue, the issue of law, scope of review: issues of law are subject to independent plenary review.

Plaintiff's cause of action is based solely on issues of law; the facts in this case are not in dispute. Defendant has admitted that Plaintiff was treated with prejudice by his promotion boards. Plaintiff does not deny or dispute that fact.

The Claims Court Docket Number 103-88C decision ratified the legal errors of the BCMR because the Court concluded that Plaintiff's claim was based on issues of fact. Consequently, the Court gave "great deference" to the decision of the BCMR instead of conducing the independent plenary review approved by this Court in *Clay Bernard Systems International LTD. v. United States*, 22 Cl.Ct. 804 at page 809 (1991), "Administration determinations on questions of law are not final and legal conclusions may receive plenary review."

In spite of the Court of Appeals finding that the legal error made by the Board is pervasive to the history of this case, the

vacated decision. Because the BCMR adopted those errors of law, the Docket Number 69-93 decision is subject to independent plenary review.

Coast Guard counsel explains why the BCMR Docket Number 69-93 decision adopts the legal errors of its Docket Number 40-88(R) decision with his statement recorded on page 51 of the administrative record.

"The BCMR isn't stupid, they know who signs their paychecks, if the applicant prevails they'll be looking for new jobs." Counsel supports that claim by explaining that the telephone call, during which he threatened to have Plaintiff criminally prosecuted and fired from his job, was directed by Ms. Nancy Battaglia, the Attorney Advisor to the BCMR according to the Federal Yellow Book.

Mr. Kinsella and Mr. Sholar provide an explanation for the reasons why the Claims Court ratified the pervasive legal error of the BCMR.

An electronic word search of the record shows that Plaintiff scrupulously avoided making any "conspiracy allegations" because such a characterization would create the illusion that his cause of action is based on issues of fact. And, that characterization would consequently cause the BCMR to apply an improper burden of proof.

The word search also reveals that the conspiracy characterization was actually formulated by the Defendant. Then, during Docket Number 40-88(R) proceedings Defendant purposefully induced the BCMR to adopt its contrived theory.

During subsequent judicial review proceedings, Defendant argued that this Court should ratify the BCMR's adoption of the conspiracy theory. However, Plaintiff vigorously objected on the basis that, "The BCMR decision is contrary to the law because plaintiff does not have the legal burden of proving the existence of a conspiracy."

Plaintiff's objection was overruled. Defendant was thus able to sustain the illusion that Plaintiff's cause of action is based on issues of fact. By inducing ratification of the bogus "conspiracy theory," Defendant was able to persuade this Court to give great deference to the findings of the BCMR.

issues of fact. By inducing ratification of the bogus "conspiracy theory," Defendant was able to persuade this Court to give great deference to the findings of the BCMR.

Even though the Court of Appeals expressly acknowledged Defendant's disingenuous tactics, the success of that strategy with Judge Horn has encouraged Defendant to once again thumb its nose at this Court. On pages 3 to 5 of its July 5, 1994 motion, Mr. Kinsella and Mr. Sholar falsely quote "Mr. Arens's conspiracy allegations." They further emphasize their misrepresentation by repeating the bogus allegation no less than six times.

On page 5 and 6 of their motion, Mr. Kinsella and Mr. Sholar then argue that this Court should once again give great deference to the BCMR decision by re-ratifying its fabricated theory. "This Court held that Mr. Arens had not submitted convincing evidence to support his allegations of a conspiracy. Accordingly, this Court concluded that Mr. Arens had failed to establish that the decisions of the promotion boards were arbitrary, capricious, in bad faith, or lacked rational basis."

Even though the Court of Appeals vacated that decision, by being able to induce legal error, Defendant successfully precluded the adjudication of Plaintiff's claim. Defendant's litigation strategy also caused sufficient delay for it to now claim the statute of limitations defense.

The standards for review of a BCMR decision are provided by the Court of Appeals for the Federal Circuit in *Arens v. United States*, 969 F.2d 1034 at page 1037 (1992). "Mr. Arens bears the burden of demonstrating by cogent and clearly convincing evidence that the correction board acted arbitrarily, capriciously, contrary to the law, or that its determination was unsupported by substantial evidence."

The BCMR Docket Number 69-93 decision is contrary to the law because it ratifies promotion board conduct in violation of statutory and regulatory mandates.

It is an uncontested fact that Plaintiff was assigned duties as a Major Field Code 34 Flight Safety Officer and Code 35 Aviator. And, as stipulated by Defendant, "LCDR Arens served as a flight safety officer and, in that capacity, he sought to highlight the dangers associated with flying under the influence of alcohol."

tiff. And, on March 24, 1970, Promotion Board Member Melvin rejected unsolicited alcohol counseling offered by Plaintiff.

Based on these facts, in his January 17, 1985 letter, the Commandant of the Coast Guard admits that Plaintiff's flight safety duties caused feelings of animus. "I am not so naive as to think the vigor of your approach to your flight safety duties did not ruffle some feathers."

In his July 22, 1980 letter to Plaintiff's spouse, the Commandant further admits that his own feathers were ruffled by a Congressional Inquiry that forced him to revoke the administrative "fear of flying" determination rendered against the Coast Guards' most decorated pilot. "As a result of a just completed investigation I have ordered that LTJG Zazzali's flight status be restored: effective immediately. Just as I have considered and evaluated the situation presented in your letter, I suggest that you examine your role as the wife of a Coast Guard Officer. After thoughtful reflection I think you will agree that you should assume a supporting and complimentary role rather than one that is destructive of your husband's career."

After rejecting drug and alcohol counseling, Captain Melvin and Captain Eagan were assigned membership on Plaintiff's promotion boards in accordance with the July 23, 1980 "stacking memo" authored by the Deputy Chief of Staff.

Defendant subsequently admits in its November 23, 1988 brief that Captain Melvin and Captain Eagan specify that Plaintiff's "specialty, flight safety, most probably was the cause of his failure of selection."

The negative effect of the prejudice is made evident by The Official Report of the 1981 Board. As specified in the report, 106 out of 129, or 82.17 percent of the officers in the zone were selected for promotion. 82.17 percent were selected for promotion. However, being a Flight Safety Officer, Plaintiff was not selected in spite of a qualifications rating that placed him in the top 13 percent of the officers in the zone.

The BCMR Docket Number 69-93 decision is thus contrary to the law because it ratifies conduct in violation of the following statutory and regulatory mandates:

The BCMR Docket Number 69-93 decision is thus contrary to the law because it ratifies conduct in violation of the following statutory and regulatory mandates:

Article 14-A-l(b) of the Coast Guard Personnel Manual: "Each member of the board must retain an impartial, unbiased and unprejudiced attitude regarding all officers being considered and regarding all groups and specialized duties in the Coast Guard."

Article 14-A-3b(1)(a) of the Personnel Manual: "Criteria for Selection... Professional competence as a Coast Guard officer in a specific field should be of primary significance through the grade of commander." Because Plaintiff was probably passed over because of his professional competence as a Flight Safety Officer, the promotion boards thus used the published "Criteria for Selection" as their personal criteria for non-selection.

Article 14-A-4(a) of the Personnel Manual: "Each member of a personnel board must evaluate impartially and fairly the fitness of each officer whose name is submitted to the board."

14 U.S.C. § 254 and Article 14-A-10(d) of the Coast Guard Personnel Manual: "Each member of a selection board shall swear that he will, without prejudice or partiality, and having in view both the special fitness of the officers and the efficiency of the Coast Guard, perform the duties imposed upon him."

The BCMR Docket Number 69-93 decision unlawfully concludes that Defendant's judicial admission of prejudice is argumentative and purely speculative.

Addressing the admission of prejudice, the Docket Number 69-93 decision concludes:

"This comment by the Coast Guard is argumentative and purely speculative. This comment does not constitute sufficient evidence to demonstrate that there was an error or injustice concerning the applicant's failures of selection."

Using that tortured logic, the BCMR would have rendered the same conclusion if the board had concluded "both officers also mentioned that the applicant's religion most probably was the cause of his failure of selection." Or if Defendant had admitted that "both officers also mentioned that the applicant's race most probably was the cause of his failure of selection."

801(d)(2) "admissions by a party opponent'' and Rule 804(b)(3) "declarations against interest."

In accordance with Rule 801(d)(2) Defendant's statement is a non-hearsay admission by a party-opponent because it is offered against Defendant and is as statement by a person authorized by defendant to make the statement.

The conclusion of the BCMR thus contradicts the findings of this Court as determined in *Deluxe Check Printers Inc. v. United States*, 14 Cl.Ct. 782 at page 794 (1988): "Judicial admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them."

And, as specified in *Speck v. United States*, 28 Fed.Cl. 254 at page 312 (1993): "A litigant is bound by his lawyer's acts. Holding the client responsible for the lawyer's deeds ensures that both clients and lawyers take care to comply. If the lawyer's neglect protected the client from ill consequences, neglect would become all too common."

The rules also validate Defendant's admission of prejudicial conduct as a declaration against interest. Pursuant to Rule 804(a)(1), the statements of Promotion Board Members Melvin and Eagan are hearsay exceptions because their sustained claims of privilege made their testimony immune from cross-examination thus making "unavailable."

This Court affirmed application of Rule 804(b)(3) in *TRW Environmental Safety* Systems *v. United States*, 18 Cl.Ct. 33 at page 50 (1989): "the admission against interest exudes credence on the theory that no reasonable person would make a false admission against himself."

The BCMR Docket Number 69-93 decision unlawfully ratifies the legal errors of its Docket Number 40-88(R) decision by adopting the same procedures, evidence, findings, and conclusions rendered in its earlier, vacated decision.

The Docket Number 69-93 decision expressly ratifies and adopts the hearing testimony of Promotion Board Members Melvin and Eagan with its cited reliance on the "Relevant Portions of Statements of Two Selections Board Members." The BCMR

Melvin and Eagan with its cited reliance on the "Relevant Portions of Statements of Two Selections Board Members." The BCMR thus repeated its legal errors when it adopted that testimony. Those errors include the following:

a. On September 27, 1988, Plaintiff received notice that Defendant intended to call Promotion Board Members Melvin and Eagan to testify as witnesses at the October 5, 1988 Special Oral Hearing. On September 27, Plaintiff filed a motion to disqualify those witnesses because Defendant failed to comply with the 30 day notice requirements of 33 CFR § 52.20-10. Plaintiff's motion was denied.

b. Prior to September 27, 1988, Defendant's sole defense is stated in its April 29, 1985 position paper. "LCDR Arens' unsupported allegations of 'Blacklist' are too vague to overcome the presumption of regularity within the Coast Guard administrative system. Therefore, this office will not present an opinion concerning this matter."

On October 1, 1988, Plaintiff filed a "Motion to Limit the Scope of the Hearing to Those Issues Properly Noticed" in accordance with the 33 CFR § 52.20-15 mandate that "new issues may not be raised after the hearing date is set." Plaintiff's motion was denied.

c. On October 5, 1988, Plaintiff filed a motion to disqualify Captain Melvin and Captain Eagan as witnesses on the grounds that their testimony was not subject to rebuttal because of Defendant's failure to comply with a Supreme Court mandate to produce requested witnesses who are readily available and under Defendant's control. Plaintiff's motion was denied.

d. On October 5, 7988, Plaintiff moved to disqualify Captain Melvin and Captain Eagan as witnesses on the grounds that they were not subject to examination or cross-examination because they were privileged by statutory and regulatory immunity. Plaintiff's motion was denied.

e. On November 2, 1988, Plaintiff received a copy of Defendant's motion to file a post-hearing affidavit of Captain Eagan. On November 4, Plaintiff filed a motion to deny the filing based on the statutory mandate of 33 CFR § 52.35-l(c) that "in any case in which a hearing has been held, the Board may not accept

The BCMR thus adopted the legal errors of its Docket Number 40-88(R) decision with its cited reliance on the "Relevant Portions of Statements of Two Selection Board Members." Consequently, the BCMR Docket Number 69-93 decision is contrary to the law.

Conclusion.

The 13 year history of this case clearly illustrates Defendant's unmistakable strategy and ability to avoid any sustainable review of Plaintiff's cause of action by utilizing threats, coercion, misstatements and misrepresentations as tools to induce delay and reversible error. Unaccountable, and unrestrained by any code of ethics or conduct, attorneys Kinsella and Sholar once again use that strategy by asking this Court to embrace those past practices and apply the statute of limitations to bar Plaintiff's cause of action.

As stated in *Sanders v. United States,* 594 F.2d 804 at page 814 (1979), "The real genesis of plaintiff's claim is the failure of the selection boards to consider him on the basis of a record which portrayed his service career on 'a fair and equitable basis' as the statutes require."

Because members of Plaintiff's promotion boards admit that Plaintiff was treated with prejudice specifically because of his status as a flight safety officer, when federal statutes and service regulations expressly prohibit such treatment, he was not treated on a fair and equitable basis as required by statute. Consequently, the Docket Number 69-93 decision of the BCMR is arbitrary, capricious, an abuse of discretion, and not in accordance with the law.

As specified by Defendant, the BCMR lacks sufficient independence to provide Plaintiff with an adequate remedy. Again quoting, "The BCMR isn't stupid, they know who signs their paychecks, if the applicant prevails they'll be looking for new jobs."

The facts in this case are uncontested: no genuine issue of material fact need be determined. Consequently, because the facts constitute cogent and clearly convincing evidence that Plaintiff should prevail, Plaintiff is entitled to summary judgment as a matter of law.

That's the end of my argument on this issue, Your Honor.

THE COURT: Thank you. Mr. Sholar, you may proceed.

That's the end of my argument on this issue, Your Honor.

THE COURT: Thank you. Mr. Sholar, you may proceed.

MR. SHOLAR: May it please the Court, this matter is before the Court on Mr. Arens' challenge to his twice being denied promotions to the rank of commander by promotions boards empaneled by the Coast Guard in 1981 and 1982. I think it's important that the Court understand the dates involved here as set forth in our statement of facts filed with the Court.

Mr. Arens' first denial of promotion was affirmed by the Coast Guard on October 27 of 1981. The second denial of promotion was affirmed by the Coast Guard on October 21, 1982.

Pursuant to the applicable statutes concerning involuntary retirement of officers twice passed over for promotions, Mr. Arens was then involuntary retired from the Coast Guard on June 30, 1983.

As set forth in our briefs, over the course of the past 13 years, or 15 years at this point, he has submitted to the Board for Correction of Military Records, counting reconsiderations of denied motions, a total of six applications concerning his failure, his twice being passed over for promotions, in 1981 and 1982.

The first such application filed November 24, 1981, Docket Number 57-82 before the board, was denied on January 20, 1983. That remains undisturbed by any order of this Court or the Court of Appeals.

The second application filed September 12, 1984, Docket 279-84, is the application and it's after hearing on the special hearing ordered by this Court was withdrawn by Mr. Arens pursuant to his application to withdraw November 14, 1988. The present application before the board which is the subject of this litigation was filed January 29, 1983 at Docket Number 69-93.

Mr. Arens first initiated litigation in this Court concerning his failure for promotion on February 17, 1988. On January 12, 1983 this Court dismissed that litigation. Mr. Arens took no action to appeal this Court's dismissal of that litigation. This Court's dismissal of that litigation remains undisturbed.

Mr. Arens then filed this complaint, the current complaint pending before this Court on May 5, 1994.

As an initial matter, Your Honor, as set forth in our motion to dismiss, the Court must determine whether it has jurisdiction over this matter. And pursuant to the --

THE COURT: Let me stop you there. Are you arguing I don't have subject matter jurisdiction or it is failure to state a claim?

MR. SHOLAR: Your Honor, well, pursuant to a statute of limitations argument I think, I'm not sure how that is currently encompassed, whether it's a failure to state a claim or whether it is in fact subject matter jurisdiction. I believe it would be appropriately subject matter jurisdiction because the jurisdictional statutes of this Court --

THE COURT: The jurisdiction of a court to proceed on a subject is different from the jurisdiction of a court to render judgment in a particular case.

MR. SHOLAR: There's no question that this Court in the abstract has jurisdiction to consider appeal -challenges to boards, the determinations of boards of military corrections. That's set forth in our cross motion for summary judgment. The standard to be applied there is unquestioned. This Court has jurisdiction over the type of claim.

The question would be whether it has subject matter jurisdiction in this particular instance based upon the jurisdictionally mandating statute providing for a 6 year statute of limitations in this matter. I believe that's properly a matter of whether this Court has subject matter jurisdiction over this particular claim filed by this particular applicant based upon the running of the statute.

THE COURT: Are you familiar with the precedent in this Court on both sides of this issue?

MR. SHOLAR: Yes, Your Honor, I am familiar with that. In any event, Your Honor, the question is whether under the statute is whether this matter is barred, whether it's probative.

THE COURT: There's no question if the statute of limitations there applies the Court does not have jurisdiction to grant relief in this case.

MR. SHOLAR: Yes, Your Honor.

THE COURT: But we're really sometimes just talking semantics when we talk the difference between subject matter jurisdiction and jurisdiction to give relief on a cause of action. My position on this is well documented in many, many cases. And I recognize there is a split in the judges here and you can find precedent in the CAFC and in the old Court of Claims on it where there is some confusion.

But in any event, there's no question that if the statute of limitations does apply and it hasn't been subject to the various theories or revisions that have lifted it, the continuing claim, equitable tolling or any of those arguments, the Court would not have jurisdiction to give Plaintiff the relief he requests.

Now, proceed from there.

MR. SHOLAR: Thank you, Your Honor. In both the Court of Federal Claims, this Court, and the Court of Claims concerning construction of the statute of limitations, it is held that they are to be strictly construed. And there's also no question that the statute commences running from the time that the Plaintiff's action accrues, that is when the facts first giving rise to his claim accrued. That's the Federal Circuit's decision and has made that expressly clear.

And there is no question, Your Honor, that in this case the latest possible date that we expect the claim to have accrued would be June 30, 1983, when Mr. Arens was involuntarily retired as a result of having been twice passed over for promotion. We would believe, and I believe there's also a dispute within cases as to this issue. The facts giving rise to that claim in fact would have arisen at the time of his second failure of promotion in October 21, 1982.

In any event, we don't need to get into that issue. There is no question that having been involuntarily retired on June 30, 1983, the facts giving rise to his claim, that is his challenge to his having been involuntarily -- or after having been twice passed over promotion were accrued and right. And there is no question, as set forth in our briefs, under the *Japanese Claims* case, the *Sanka* case, the *Continent* case, that Mr. Arens knew of the underlying injury, that is his dismissal, his retirement after having been twice passed over for promotion, as of the date that that occurred, June 30, 1983.

Therefore, his assertions concerning his lack of knowledge of particular facts to support his claim, that is the asserted prejudice of the board members are simply irrelevant. That has been set forth in our briefs. The crucial facts of which he knew were undisputed, his being passed over for promotion as of June 30, '93.

With respect to the continuing claim doctrine, there's also a dispute, I believe, as to whether the Federal Circuit, and Mr. Arens has raised this dispute, as to whether that doctrine is recognized within this circuit. In any event, Your Honor, the continuing claim doctrine holds that where there is a continuing duty to a claimant which a cause of action arises each time at which that continuing duty is breached by the government. Assuming it's applicable in this circuit as a matter of law, it's simply not applicable to this case for the reasons that I'm going to state.

The actions of which Mr. Arens complains is his failure of promotion in 1983. The continuing claim based upon a continuing breach of such facts are simply not applicable here. The actions which this Court must focus upon as opposed to determining the statute of limitations are his involuntary retirement, and as I've repeatedly said, the latest on which that cause of action could have accrued is June 30, 1983.

For similar reasons, the "half-a-loaf" doctrine is inapplicable in this case. Mr. Arens asserts that in fact the June 1987 board decision denying one of his applications granted him some relief, therefore by only granting him partial relief he has a continuing cause of action to challenge that board's determination that he was entitled to some portion of the relief.

In any event, Your Honor, again assuming that that is even applicable in this circuit, what -- and we address this fully in our reply brief at pages 5 and 6 -- what the board did was determine that a 1977 fitness report of Mr. Arens' required the evaluating officer to check one of five boxes ranging from unsatisfactory to satisfactory. That box was not filled in. Therefore, the board gave Mr. Arens the benefit of the doubt and corrected the record to check the highest applicable score in that circumstance.

Nonetheless, Your Honor, as has been repeatedly noted, the board considers in addition to fitness scores, work history, breadth of experience, all matters within the applicant's file in determining whether to grant him the promotion determined, the promotion

sought. The board did not, even giving Mr. -- even correcting the record to that extent, the board found no basis for Mr. Arens' challenge to his failure of promotion and, in fact, denied his application.

In that circumstance, Your Honor, where the board -- there is no basis for Mr. Arens to assert that he is as a matter of law entitled to the relief sought, that is determination that the board incorrectly failed to grant his application for relief based upon that action taken by the board in 1987.

Also, Your Honor, although I'm uncertain of Mr. Arens' statements in oral argument whether he was asserting that he is not aware of this board's or this Court's order in January 1993 dismissing his first action, nonetheless, as we have asserted in our briefs, there is no question that the statute of limitations is not tolled during the pendency of a dismissed action.

In this case there is also no question that this Court's -- Mr. Arens' prior claim was dismissed by this Court as a result of Mr. Arens having determined to voluntary withdraw his application for correction before the board.

Just to address this and move on, Your Honor, even if Mr. Arens assumes that he was not aware of this Court's dismissal of his prior complaint in January '93, he nonetheless filed an entirely new complaint in this matter in 19 -- in May 1994. Obviously, by that time since he was filing a new complaint he seemed -- by filing a new complaint obviously he was not proceeding upon the old complaint.

In any event, Your Honor, the old complaint was dismissed by this Court. Mr. Arens should know that from his records.

With respect to the equitable tolling argument, this is again addressed in our briefs. There is a very narrow exception that tolling regarding the statute of limitations only applies when a claimant actively pursues a defective pleading or is induced to miss a filing deadline by actions of the opponent. It does not apply where, as in this case, and applicant has himself withdrawn an application and assents to the dismissal of the actions in essence.

And at this point, Your Honor, I think we should address the reasons Mr. Arens has asserted for his withdrawal concerning the conversation that was had with him by a Coast Guard attorney. The

Coast Guard attorney Commander Matthew does not deny that a heated conversation was had with Mr. Arens. He does vehemently deny statements made during the course of that discussion to the effect that Mr. Arens repeatedly asserted that the board knows who writes their checks, with whatever inference is intended to be drawn from that.

In the record Mr. Arens has proffered to the board, it's in the administrative record, what purports to be a transcript of that conversation as if taken from a recording of that conversation. My understanding from speaking to Coast Guard personnel is that recording has been never produced by Mr. Arens to the Coast Guard.

Coast Guard General Counsel Mr. Evans as well as Coast Guard Counsel Mr. Dan, who is in the courtroom today, when Mr. Arens first raised these allegations concerning threats that were made by Mr. Matthew, they investigated those allegations, questioned Mr. Matthew concerning them, in fact sent correspondence to Mr. Arens indicating that if he had any evidence that such threats were made, if such continuing threats, as he was asserting, were continually made against him, to please bring such information to their attention. And also, if there are any records or any other information such as being able to trace phone calls to determine who these individuals allegedly were, to bring those matters to their attention.

As I indicate, Your Honor, except for Mr. Arens' assertions about those phone calls there is no indication any of those threats were made. Commander Matthew vehemently denies having said the things that he was attributed to in that conversation.

But in any event, Your Honor, Mr. Arens has also asserted in essence two contradictory things. He's asserting that he withdrew his application as a result of those threats. And he's also gone on to describe a basis for his, the withdrawal of his application having been his disputes with the special panel empowered, empaneled within his prior litigation by this -- upon the order of this Court concerning subpoenaing of witnesses, testimony of witnesses, the right of the Government or the right of the Coast Guard to post-hearing briefs in that matter. Your Honor, those are matters which should have been brought up in the prior litigation in this Court. They are in fact addressed by the board in its decision in the

prior litigation and addressed by Judge Horn in her decision, in her motion for summary judgment.

The fact remains, Your Honor, Mr. Arens chose to voluntarily withdraw his application after a full factual hearing had been held on his prior allegations. Those matters are simply not before the Court at this time, Your Honor.

And in any event, with respect to the statute of limitations we're concerned not with the jurisdiction of the board, that is whether Mr. Arens withdrew his board application and what the grounds for that were but with the jurisdiction of this Court. And I'll repeat, Your Honor, there's no question that this Court dismissed Mr. Arens' first complaint in January 1993. And the pendency of a dismissed action simply does not toll the statute of limitations. Mr. Arens has not shown nor are there present any grounds for tolling the statute in this case.

Which also leads to the necessity for this Court to be clear as to exactly what is currently before it. After dismissal of the first Claims Court complaint Mr. Arens then filed an application currently before the board, the application number 69-93. As the Court of Claims and as the Court of Appeals noted in their decisions, when an applicant before the board withdraws an application the board may only reconsider issues raised in the withdrawn application upon a showing of good cause. That is the standard to be applied both under the version of the regulation at issue in the prior litigation and under the amended version of the regulation.

Once the applicant withdraws the application then the board can only reconsider those issues raised on that application if good cause is shown. When Mr. Arens brought his new application in 1993, the Coast Guard challenged the propriety of the board to hear that application because good cause had not been shown. Set forth in the Government's or the Coast Guard's filing of the administrative record in this case at page 61, dated June 1, '93, is the Coast Guard's response to Mr. Arens' application in which the Coast Guard indicates the application should be denied as applicant has failed to demonstrate the good cause required to have the board take up further consideration of the issues raised in the withdrawn application.

In response to the Coast Guard's assertion that good cause was not present Mr. Arens filed and as it's copied at pages 30 of, be-

ginning of page 30 of the Coast Guard's administrative record, his reply to that memorandum in which is stated beginning at page 2 of his reply, which is at pages 32 and 33 of the administrative record, quoting here the heading of Mr. Arens' reply concerning this issue: "A showing of good cause applies only to issues raised in a withdrawn application. This application is not based on issues raised in a withdrawn application."

Mr. Arens then goes on at paragraph 6 on the next page 33 of the administrative record to state, quoting again, "However, this application is not based on issues raised in the withdrawn application. November 14, 1988, when Docket Number 40-88 was withdrawn applicant was unaware of the admitted prejudicial conduct of his promotions boards. That injustice was not discovered until December 1, 1988, after Docket Number 40-88 was withdrawn."

On the basis of Mr. Arens' assertion to the board that he was not asserting issues raised in the withdrawn application concerning the alleged "Blacklist" memorandum and other issues raised and fully adjudicated in the factual hearing held on this matter, the board granted this man his application. And, in fact, expressly considered only the issues not raised in his prior application, that is the alleged prejudicial treatment of Mr. Arens because of a prejudicial view of his duties as a Flight Safety Officer. That was all that the board determined. That is all that is before this Court.

Thus, leading into our motion for summary judgment, assuming that there is jurisdiction that is all that is before this Court. On those issues, as is set forth in our brief, Mr. Arens' bases his assertions solely on a statement of counsel for the Coast Guard in a post-hearing brief filed at the conclusion of his prior hearing that, again quoting here, "both officers also mentioned that the applicant's rather narrow specialty within a specialty, that is flight safety as a subspecialty of aviation, most probably was the cause of his failure of selection." That's at page 16 of our brief quoting Coast Guard's post-hearing brief at administrative record page 79.

The board then determined that -- It's important to note, Your Honor, Mr. Arens, as set forth in our brief, bears a heavy burden of showing that the board's decision was arbitrary, capricious and not based upon the facts. That is the only fact asserted by Mr. Arens

for his assertion that the previous, that the board was prejudiced against him as a result of his flight specialty.

The board further noted the testimony in affidavits of the members of the panel which indicated that all matters within Mr. Arens' personnel file were considered by the board in determining not to pass, not to promote him. They also noted in their testimony that it was a competitive process and a means of determining not simply who was qualified but who was the most qualified. The matters within an officer's -- before a personnel board in determining whether to grant an officer promotion basically are the entire personnel file of the applicant, including letters of recommendation, including restrictions of his job, including statements of his other experience. Mr. Arens -- The board determined that Mr. Arens simply had not shown that any such prejudice against his job category was present.

Also, Your Honor, as indicated in our briefs, I don't mean to rehash this, the job description of Mr. Arens as Flight Safety Officer is in fact, that's Mr. Arens' specialty, but what the board considered is whether in fact he has experience in a wide range of matters outside of his specialty. The board simply in this case determined Mr. Arens based upon the allegations presented to it had not shown, had not met his burden of showing prejudice on the basis of those applications.

Now, Your Honor, Mr. Arens at this point is making, has made, continues to make in his pleadings and his briefs numerous allegations concerning matters at issue in the prior litigation. Assuming that this Court has jurisdiction over this matter those matters are simply not before the Court because Mr. Arens, as we addressed in our brief, induced the board to rely upon the fact that he was not making those allegations in order to obtain the board's hearing of the application that he had presented.

In order for him to have brought those issues before the board he would have had to have shown good cause to bring those matters before the board. In order to avoid having to make such a showing he represented to the board that they were not the same issues that they were additional issues. Mr. Arens should not be able to in essence have his cake and eat it too. He cannot assert before the board issues in a withdrawn application where he has

not such a showing of good cause by inducing the board to believe that those issues are not present in order to avoid having to make a showing of good cause. Those matters are simply not before this Court.

With respect to the statistical analysis Mr. Arens has asserted, in any event, Your Honor, those are matters brought up before the previous, in the previous litigation in the previous applications to the board. They are not at present, though, when Mr. Arens put his application to the board they were not before the board.

But in any event, just to make the matter clear, Your Honor, an affidavit was filed in previous litigation by Mr. Lanterman of Coast Guard who is the chief of occupational analysis, Selection and Classification Branch, in which Mr. Arens -- Mr. Lanterman attempted to determine how Mr. Arens had arrived at that statistical calculation. Mr. Arens bears the burden of showing facts necessary to show that he was entitled to the relief that he seeks did not break down in any sufficient fashion how that application or that calculation was determined.

Apparently, Your Honor, what Mr. Arens has done is he has taken nine months, worth of scores of fitness reports by other lieutenant commanders, reached some type of mathematical calculation of what those were or what the average of those were and compared them to several years worth of statistical analysis of his own fitness reports. Several things, Your Honor. Number one, those fitness reports, as I've indicated and set forth in the briefs, are merely one aspect of the matters before the Court in determining whether an applicant is to be promoted. Other matters include experience, letters of recommendation, basically the personnel file. In any event, those matters are also a competitive analysis based on other applicants.

But in any event, Your Honor, Mr. Arens did not show in the previous litigation that there is any veracity to his own statistical analysis. That's all that we know about that statistical analysis at this point. In any event, Your Honor, that is simply not here.

And one other matt -- Well, with respect to the matters Mr. Arens has asserted briefly in his argument, we have addressed most of them. With respect to his assertion that the board's denial of his 1993 application adopted and affirmed the previous applications which are before this Court, I think as has been clearly demon-

strated, quite simply Mr. Arens did not even get in the door with his applications unless he showed good cause. He did not show good cause. The board only addressed what was currently before Mr. Arens -- what Mr. Arens has said before.

With respect to I believe Mr. Arens stated in support of his assertion that he has a continuing claim, as I understand his argument in this matter, that the new matters asserted in 1993 were also raised in his amended complaint before the Court in 1989 in the litigation that was dismissed. Well, if that is the case, Your Honor, then there is also a res judicata problem. If these matters were before the Court before and this litigation was dismissed, they certainly cannot be raised again.

With respect to Mr. Arens' assertions concerning my own use of the term "conspiracy" in the pleadings, just briefly, Your Honor, the Court itself used that term. And in any event, that's simply not a matter that's relevant at all. Mr. Arens it's evident, there's no question, must bear the burden of showing by clearly and cogently -- clear and cogent evidence that he is entitled to the relief that he seeks. He must show that the board's decision was arbitrary, capricious and not based upon law.

And with respect to the statute of limitations, Your Honor, just in conclusion, this litigation demonstrates precisely why statutes of limitations are present. This matter is now 11 years old. Mr. Arens has had six opportunities to present any arguments he needs to assert to the board and a previous opportunity to present such matters to this Court concerning the reasons he was denied promotion in 1981 and 1982. He has in fact had a full evidentiary hearing before the board, as ordered by this Court, concerning all the matters that he has asserted with respect to his assertions, his assertions that he can assert at this point in this litigation before this Court.

Those matters have been previously brought to the board and previously brought this Court. They are simply not before the Court today. And the statute of limitations exists to prevent such matters from being litigated ad infinitum. Therefore, Your Honor, I reserve, as Your Honor has indicated, any further rebuttal time. And we would request that our motion to dismiss be granted or, in the alternative, that the Court in a summary judgment affirms the decision of the board in this case.

THE COURT: Thank you. Mr. Arens?

MR. ARENS: Yes, Your Honor. First I would like to just again look at the jurisdictional statute, 28 U.S.C. § 2501. And taking it very literally it says, "every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

Now, Plaintiff's claim in the 69-93 docket number docket of the BCMR was filed before this Court on September -- I'm sorry, February 17 of 1988. That claim was filed. The petition was filed. Defendant was on notice.

Now, as far as Defendant's claim that there was a full evidentiary hearing and that there were -- the case had been litigated at various stages six times, the claim currently before this Court was admitted on November 23, 1988. The bulk of those cases took place before that evidence was available. Defendant claims that there was a full evidentiary hearing by the BCMR. I have pointed out that that hearing denied Plaintiff proper notice, 30-day notice, notice of the witnesses were given to Plaintiff two days ahead of time, two days ahead of time. And there was post-hearing evidence that was submitted contradicting, contrary to the statutes. Plaintiff was denied the opportunity to examine and cross-examine the witnesses.

And Defendant also claims that the issues that were presented in this case were previously litigated. However, Defendant and the BCMR raised those issues again by relying on the testimony, the hearing testimony of those witnesses, Captain Melvin and Captain Eagan. The decision relies on that. Therefore, the propriety of that testimony, the legality of that testimony is made an issue by their defense.

Plaintiff doesn't make that an issue. Plaintiff just strictly relies on the admission, nothing more than that. That's all that's requires.

Now, as far as Commander Matthew claiming to deny the transcript. During BCMR proceedings he was asked to provide an affidavit and refused to do it. Now, according to the rules of this Court that's non-evidence and it should not be considered because affidavits are required, the minimum of an affidavit. That's nothing other than hearsay argument that they claim that Commander Matthew denied that. And that information was made available to the General Counsel of the Department of Transportation in 1989.

Commander Matthew waits four years to deny that he said that, and then he only does it orally.

And Defendant also refers to the affidavit of Mr. Richard Lanterman regarding his analysis of what's to be considered and what all can be considered by the promotion boards. The promotion boards made it very clear that there was only one issue to be considered: plaintiff was a Flight Safety Officer. Nothing more, Nothing more became relevant He was probably passed over because he was a Flight Safety Officer. And the statutes and regulations strictly prohibit that.

I have nothing more.

THE COURT:- All right. Mr. Sholar?

MR. SHOLAR: I have nothing more, Your Honor.

Bench Ruling by Senior Judge Kenneth R. Harkins
No. 94-289C March 29, 1995

THE COURT: Well, one thing we need to clarify is the effect of taking a matter to the Board of Correction of Military Records as far as the running of the statute of limitations is concerned. In this Court and in the previous Court of Claims there is no requirement to exhaust administrative remedy.

This matter came up frequently. The districts, some districts and some circuits had developed in military pay cases a requirement that there be an exhaustion of military remedy. However, the question of the jurisdiction of this Court to proceed directly on a military pay claim was clear. And the question of whether or not the complainant, the plaintiff, should go to the board was a matter of permission. It was permissive and not mandatory.

So the statute of limitations began to run in this case on the date of the involuntary separation. Now, for six years that date of involuntary separation was June 3, 1983, I believe. And so it would six years later be '89. And Plaintiff filed a case in this Court within the statutory period.

That case, the Docket Number 103-88C, in as much as Plaintiff in the meantime had gone before the Board of Correction of Military Records the precedent developed was that even though you weren't required to go before a Board of Military Record, if you

did you were bound by it unless you could show, unless the plaintiff could show arbitrary and capricious behavior, lack of substantial evidence, contrary to law, those general standards, in other words, the administrative review standard.

MR. ARENS: Your Honor, may I respond?

THE COURT: Not yet. Right now I'm deciding this case and rendering my opinion and I'll make a ruling. At the end of that you'll be permitted to state on the record what you want to state as far as this proceeding is concerned. Until that happens don't interrupt.

Now, the Court of Claims, our predecessor, the military pay cases did not follow a judicially developed exhaustion requirement. In cases that involved application to bar limitations the Court of Claims articulated the rule that exhaustion of administrative remedies by resort to correction board procedures was permissive. And *Kirby v. The United States*, 201 Ct.Cl. 527 (1973) was one such authority for that.

In *Kirby* plaintiff, in a military retirement pay claim brought after the six year statute of limitations had run, argued that the statute had been tolled while administrative relief was sought. The Court held that resort to the post-discharge remedies provided in that case by the Air Force through its Discharge Review Board and the Board for the Correction of Military Records was permissive in nature and did not serve to toll the running of the statute of limitations. And the rule in the *Kirby* case has been followed in the Court of Claims and Claims Court in numerous cases. See *Schmidt v. United States*, 3 Cl.Ct. 190 at 193, and *Gilmore v. United States*, 228 Ct.Cl. 829.

In the Court of Claims and in this Court plaintiff could bypass the Board for the Correction of Military Records and bring an action originally in this Court. And the citation for that would be *Doyle v. The United States*, 599 F.2d 984.

So when plaintiff filed his initial complaint he was within the statute of limitations. And in that complaint he is proper to, in that proceeding it was proper to suspend and to permit additional information that came in the amended complaint to be considered by the board. There was suspension for 90 days while that happened.

However, after plaintiff received a decision that was not acceptable to plaintiff, plaintiff appealed on the basis of the refusal of the board to permit his application to the board to be withdrawn and on the recognition or the approval by the Claims Court of the board's action in that respect.

And the Federal Circuit when it reversed the Claims Court had the following to say, "As to whether Mr. Arens appreciated the significance of his withdrawal of his application, he stated in his brief, 'Appellant thus elected to take the extreme step of abandoning his legal right to the BCMR process with full recognition that it could preclude the exhaustion of administrative remedies.' Thus, it appears clear that Mr. Arens definitely understood the action he was taking. Further, although the board relied upon the pendency of the Claims Court suit as one reason not to allow the withdrawal of Mr. Arens' application, Mr. Arens stated in his request for withdrawal that he would dismiss the Claims Court suit upon the withdrawal of his application. The board either somehow unaware of Mr. Arens' representation to this effect or for some reason disregarding it relied on the Coast Guard representations of the Claims Court suit's continued existence when it ruled that the Government had shown good cause for continuing to a judgment. The Coast Guard's reliance upon the continuation of the Claims Court action in its attempt to show good cause in the light of Mr. Arens' statement appears to be disingenuous."

That's the end of what I'm reading. I read that from 969 Fed. Reporter 2d at page 1040.

And as a result of that representation that he would withdraw the Court of Claims and the final judgment after the Court got the mandate and issued its direction to the Board of Correction of Military Records, entered the judgment, "It is further ordered and adjudged that jurisdiction is not retained by this Court in this case." And I'm sure that the Plaintiff understood the meaning of that judgment.

So what we have, a situation where Plaintiff filed within the statute of limitations and then withdrew or caused that filing in the Claims Court to be ended, proceeding dismissed, and the jurisdiction of the Court that was obtained by the filing of Plaintiff's complaint was vacated. As a consequence, when Plaintiff filed his new complaint on May 5, 1994, the one that's in the papers rele-

vant to this argument, it was a complaint filed after the statute of limitations had run, unless there can be a showing that there were subjects to some one of the provisions like the "half-a-loaf" doctrine, continuing claim or equitable tolling.

The reason that this case was assigned off the wheel rather than sent back to the judge that originally had the complaint was that the Court was new and the Court did not have continuing jurisdiction under the old complaint.

Now, it would have been possible for Plaintiff if he had moved, would be contrary to the representation he made to the Federal Circuit, that he would dismiss, but it would be possible for the Court to move -- for Plaintiff to have moved the Court to continue its jurisdiction. But he did not do so. And judgment was entered that that case was no longer within the jurisdiction of the Court.

So we have to look at the question of the "half-a-loaf" doctrine. And one of the most direct statements on that is *Rumph* R-U-M-P-H *v. the United States*, 228 Ct.Cl. 855, discussing the "half-a-loaf" doctrine is that the rationale is that once an administrative body decides that relief is proper it cannot arbitrarily decide to give half a loaf. And cites *DeBow*, 193 Ct.Cl. at 499. That's *DeBow*, DE-capital B-O-W. And it states, it applies only where the relief sought should have followed as a matter of law from a partial relief granted by the Correction Board, and when the plaintiff is required to seek administrative relief before coming to the court. Neither factor exists in the *Rumph* case.

The factors, the relief sought should have followed as a matter of law from a partial relief granted, and when the plaintiff was required to seek administrative relief before coming to court, says there's another reason why the Plaintiff cannot avail himself of the "half-a-loaf" doctrine. That principle has generally been applied only in cases in which it was mandatory to seek administrative relief before coming to court. *Hankins v. United States*, 188 Ct.Cl. 32. And decision cited at 34 Note 1.

Resort to the Correction Board for the upgrading of a discharge, however, is permissive and not mandatory where the claimant could, as here, -- and I'm talking, reading now from the *Rumph* case -- have brought his monetary claim directly to this Court at the outset, we have held that the failure of the Correction Board to give full monetary relief does not create a new cause of

action, nor does it defer or prolong the statute of limitations that Congress has established. So there's no tolling under the "half-a-loaf" doctrine in that case and the standards which are applicable preclude its application in this case.

Now, the question of continuing claim. The continuing claim doctrine is one situation involved the *Hart v. The United States*, 910 Fed.2d 815. And that involved a survivor benefit plan. And the trial court had applied the continuing claim doctrine. And the court says that was wrong to apply it. The claim first accrues and the six year statute of limitations begins to run when all the events that have occurred which fixed liability to the Government entitled the Claimant to institute an action.

And in that case, in the *Hart* case the continuing claim doctrine did not apply and they reversed the trial court. And stated that "The statute of limitations has long been regarded as a meritorious defense in itself serving a public interest. The public interest served in the statute of limitations is twofold. First, it protects the Government from having to defend suits long after the events sued upon have occurred. And, second, it puts an end to the possibility of litigation after a reasonable time." And that is from the *Hart* case, 910 Fed.2d. at page 818.

Now, the continuing claim doctrine is not dead, presumably. The *Applegate* case, *Applegate v. The United States* concerned a flooding and the stabilization rule that applies in flooding cases. And it says, "This Court's application of Dickenson's Stabilization Rule here does not invoke the continuing claim." And I'm reading from page 1583. "The continuing claim doctrine involves a series of distinct events pleaded to serve to the court as a single overall event spanning many years."

And in the Dickenson Stabilization situation, that's the Dickenson Rule, is the rule announced in 331 U.S. As soon as I find the initial thing I'll tell you.

(Pause.)

THE COURT: 331 U.S. 745. And this is discussed, what I'm talking about is discussed on page 1583 of *Applegate v. United States*, 25 Fed.3d 1579 at 1583.

Also in the *Applegate* case the Federal Circuit observed that "This Court reviews *de novo* decisions of the Court of Federal

Claims on matters of law and reviews for clear error findings of fact." And those standards apply in this case, of course, where both parties are asserting that they are only questions of law involved rather than -- and that no material facts are in dispute.

Now, another situation that tolls the statute of limitations or could toll it is if there's been a concealment of facts that Plaintiff needed in order to know whether he had a cause of action. There's been no concealment in these cases -- in this case because the Plaintiff knew he had a cause of action and his first applications to a Correction Board involved allegations of error in the evaluation of his, evaluation of his service records.

Now, a statute of limitations for a long time did not, particularly the statute of limitations in the Tucker Act situation, could not be tolled against the United States. *Irwin v. Veterans' Administration* changed that. That's the case decided in 1990, December 3, 1990. The citation I have for it is 111 Supreme Court 435.

But in that case the doctrine of equitable tolling can be applied against the United States but it's only to be applied sparingly. And it does not involve the kind of justification that is present in this case.

In *Irwin* the Supreme Court held that in a case against the Government a failure to file within the statutory period may be excused and the filing deadline extended by application of the doctrine of equitable tolling. *Irwin* was an employment discrimination action under Title VII, the Civil Rights Act of 1964, that involved limitations on actions to contest the decisions of the Equal Employment Opportunity Commission. On the facts in *Irwin* the complaint filed in the District Court was determined to be untimely and the limitation period was not extended by application of equitable tolling concepts.

Against the Government, equitable tolling can be used only when the waiver of the sovereign immunity is unequivocally expressed. In such a case the Government stands in the same position as a private party. The Supreme Court stated, "Once the Congress has made such a waiver we think that making the rule of equitable tolling applicable to suits against the Government in the same way that it is applicable to private suits amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically use-

ful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable relief applicable to suits against private defendants should apply to suits against The United States. In a suit against the Government no more favorable tolling doctrine may be employed against the Government than has been employed in suits against private litigants."

And this matter, this doctrine of equitable tolling is relatively new. But it's applied sparingly in a case against the United States. And the facts of this case do not justify the doctrine of equitable tolling.

Now, in order to be absolutely clear on what I'm ruling I'll take Defendant's motion, July 5, 1994, pages 11 to 14, starting at the bottom of the page, "Any cause of action derived from Mr. Arens' alleged unlawful denial," and so forth. And that, at the bottom of page 11 over through on page 14, the ending of the paragraph at the top of the page, "No saving statute tolls the limitations period of 28 U.S.C. Sections 2401(a) and 2501." Those materials are adopted by the Court as a correct statement of the law.

And then we go to Defendant's September 16, 1994 reply, pages 4 and 5, starting at the bottom of page 4 under Roman numeral II. It starts, "The remainder of the relief sought," and so forth, and goes over on page 5 and ends at the bottom of the first full paragraph there with the citation *Dupres v. Jefferson*. And then from the statements there identified are adopted by the Court as applicable to this case.

And on the November 11, or November 1, 1994 reply, Defendant's reply on November 1, 1994, pages 5 and 6, starts at the bottom of the page, "Further, the partial relief" is the start of it. And it goes over to the bottom of page 6. The statements there are adopted by the Court.

As a result, it's my determination that the complaint Plaintiff filed on May 5, 1994 is barred by the statute of limitations. And Defendant's motion to dismiss is treated as a motion to dismiss for lack of jurisdiction because the complaint does not state a cause of action upon which relief can be granted. That's Rule 12(B)(4).

And it's not necessary in view of this ruling for me to make any finding with respect to Defendant's other argument that even if we had jurisdiction what the Board of Correction of Military Records

did in Docket 69-93 is neither arbitrary or capricious, lacking support in substantial evidence or contrary to law probably is valid. In any event, if this, my decision is appealed what the Federal Circuit says in *Applegate* that "this court reviews *de novo* decisions of the Court of Federal Claims in matters of law and reviews for clear error findings of fact," all this, all of the Plaintiff's, all of Defendant's arguments and Plaintiff's argument on the motion for summary judgment, since there are no facts in dispute, will be before the board -- or before the Federal Circuit.

So an order will be entered directing the Clerk to dismiss the complaint on the basis of the statements I've just made.

And at this point if Plaintiff wishes to state anything on the record he may do so.

MR. ARENS: No, Your Honor. Thank you, Your Honor.

THE COURT: Defendant, do you have anything to state on the record?

MR. SHOLAR: No, Your Honor.

THE COURT: Gentlemen, I can't say that this has been fun. But there must be an end sometime to this continual regurgitation of matters that previously have been decided. The statute of limitations applied.

(Whereupon, at 12:26 p.m., the hearing was closed.)

REPORTER'S CERTIFICATE

DOCKET NO.: 94-289C

CASE TITLE: GERALD F. ARENS v. UNITED STATES

HEARING DATE: March 29, 1995

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the

hearing in the above case before the United States Court of Federal Claims.

Date: March 29, 1995

Scott Adams
Official Reporter
Heritage Reporting Corporation
1220 L Street, N. W.
Washington, D. C. 20005

In the United States Court of Federal Claims

No. 94-289C
(Filed: March 30, 1995)

GERALD F. ARENS,

Plaintiff

v.

THE UNITED STATES,

Defendant

ORDER

Pursuant to order, oral argument was heard on March 29, 1995, in the United States Court of Federal Claims, Washington, D.C.

Appearances

For plaintiff: Gerald F. Arens, Esq., represented pro se
For defendant: John P. Sholar, Esq.
Alexander Millard, Esq., Dept. of Transportation

Relevant Papers

Complaint, filed May 5, 1994

Administrative Record of Docket No. 69-93 Proceedings Before the United States Department of Transportation Board for Correction of Military Records (BCMR), filed June 20, 1994, pursuant to plaintiff's June 17, 1994, motion

Defendant's Motion to Dismiss, filed June 5, 1994

Plaintiff's Response to Defendant's Motion to Dismiss and cross-Motion for Summary Judgment, filed June 20, 1994

Plaintiffs Appendix, filed July 20, 1994

Plaintiff's Statement of Facts, filed July 20, 1994

Defendant's Reply in Support of its Motion to Dismiss, Response to Plaintiff's Cross-Motion for Summary Judgment, and Motion for Summary Judgment, filed September 16, 1994

Defendant's Statement of Facts, filed September 16, 1994

Defendant's Counter-Statement of Facts, filed September 20, 1994

Administrative Record, filed September 22, 1994, pursuant to defendant's September 16, 1994, motion

Plaintiff's Reply in Support of its Cross-Motion for Summary Judgment, and Response to Defendant's Motion [sic] for Summary Judgment, filed October 17, 1994

Defendant's Reply in Support of its Motion for Summary Judgment and Motion to Dismiss, filed November 1, 1994

Plaintiffs Motion to Strike Defendant's Reply in Support of its Motion for Summary Judgment and Motion to Dismiss, filed November 14, 1994

* * * * *

Plaintiff's November 14, 1994, motion to strike defendant's November 1, 1994, reply was pending at the start of argument. After discussion of orders filed September 7, 1994, October 17, 1994, and November 10, 1994, relative to plaintiff's previous motions to strike or to reconsider other matters, plaintiff's November 14, 1994, motion to strike was denied. Plaintiff's November 14, 1994, motion was treated as an authorized responsive brief.

Plaintiff is represented pro se. Plaintiff, however, is an attorney admitted to the bar in the State of Connecticut and practices law in that state. The standards relative to pro se representation *(see e.g. Haines v. Kerner,* 404 U.S. 519 (1972)) are not applicable.

At the close of argument a bench ruling was made. Reasons for the ruling were stated on the record; specific pages in the motion papers were identified on the record and adopted by the court.

For the reasons stated at the close of argument, plaintiff's claim is barred by limitations. Defendant's motion to dismiss is treated as a motion pursuant to RCFC 12(b)(4), failure to state a claim upon which relief can be granted, and, because matters outside the pleadings are presented, is converted to a motion for summary judgment, subject to the procedures in RCFC 56 and RCFC 56.1. There are no genuine issues of material fact and defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion to dismiss is allowed; plaintiff's motion for summary judgment is denied. The Clerk is directed to dismiss the complaint. No costs.

S/ Kenneth R. Harkins
Kenneth R. Harkins, Senior Judge

In the United States Court of Federal Claims

No. 94-289C

GERALD F. ARENS,

JUDGMENT

v.

THE UNITED STATES,

Pursuant to the court's order of March 30, 1995, allowing defendant's motion to dismiss, and denying plaintiff's motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

David A. Lampen
Clerk of Court

March 31, 1995 By: S/ David A. Lampen
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of all plaintiffs. Filing fee is $105.00.

In the United States Court of Federal Claims

NOTICE

GERALD F. ARENS,

No. 94-289C

vs.

THE UNITED STATES,

CLERK'S OFFICE

Washington, D.C., April 28, 1995

To Attorney of Record, Assistant Attorney General and Senior Judge Kenneth R. Harkins:

Please take notice that in the above cause there has been filed this day, on behalf of the parties,

Transcript of proceedings (1 vol.) taken at Washington, D. C., on March 29, 1995.

S/ David A. Lampen
David A. Lampen, Clerk

In the United States Court of Federal Claims

No. 94-289 C
Senior Judge Kenneth R. Harkins

GERALD F. ARENS
Plaintiff,
vs.
THE UNITED STATES,
Defendant.

PLAINTIFF'S MOTION TO SET ASIDE JUDGMENT

In his pleadings, plaintiff asserts that his remanded cause of action is a continuance of the unadjudicated claim filed as Count Fifteen in his March 27, 1989, U.S. Claims Court Docket No. 103-88C amended complaint. That complaint requested judicial review of the U.S. Department of Transportation, Board for Correction of Military Records (BCMR) Docket No. 40-88(R) final decision. The Court subsequently affirmed the BCMR decision with its opinion in Arens v. United States, 24 Cl.Ct. 407 (1991). However, those decisions were vacated and remanded by the Court of Appeals after finding that: "The legal error made by the Board and ratified by the Claims Court is pervasive to the history of this case," Arens v. United States, 969 F.2d 1034, 1040 (Fed.Cir. 1992).

On page 7 of its October 28, 1994 reply, defendant seeks to exploit the pervasive legal errors of the Courts' Docket No. 103-88C opinion: "Mr. Arens's prior action in the Claims Court was dismissed by this Court's January 12, 1993 entry of judgment, following Mr. Arens's withdrawal of his application for reconsideration before the BCMR."

Because he was denied notice of the January 12, 1993 judgment cited by defendant, plaintiff responds in his November 10, 1994 motion to strike: "Because plaintiff failed to receive the notice cited by defendant, plaintiff assumes that defendant intended to cite this Court's Dec. 18, 1992: 'Remand Order'."

Addressing plaintiff's non-receipt of the January 12, 1993 entry of judgment, as reported on page 16, at lines 15-22 of the

transcript, the following exchange occurred during oral argument on March 29, 1995:

> THE COURT: Are you saying, are you charging our Clerk with failing to mail this to you?
>
> MR. ARENS: Well I investigated, Your Honor. And at the time, at about that time there was a mail carrier in our [local area] who was arrested for burning mail instead of delivering it. After I received defendant's pleadings. Now I do not know whether or not, and I haven's stopped down to the Clerk.

Thus, at the time of oral argument plaintiff did not know the reason for his lack of notice regarding the entry of judgment. Consequently, the March 31, 1995 judgment the Court applied the statute of limitations thereby baring plaintiff's cause of action.

After oral argument, during a March 29, 1995 visit to the Office of the Clerk, plaintiff requested a copy of the certificate of service required by Rule 77(j) and 5(c) to be served with an entry of judgment: "**Filing; Certificate of Service**. All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court ..." Rule 5(e)(2) provides an additional requirement: "The certificate of service shall be attached at the end of the original document, including appendices, and copies thereof." Plaintiff was advised that no such document existed.

In his May 5, 1995 letter to the Clerk of the Court, plaintiff requests confirmation of the entry of judgment: "Please confirm the existence or non-existence of the entry of judgment and the certificate of service." If such a judgment had been entered, plaintiff also requested a copy of the judgment: "And, as I have not yet received a copy of the entry of judgment cited by Counsel for Defendant, please provide a copy of the judgment and attached certificate of service if such a judgment was in fact issued."

With his May 10, 1995 letter, the Clerk enclosed a copy of the judgment without the required certificate of service. On May 15, 1995, plaintiff received the copy of the judgment.

Therefore, Pursuant to RCFC 60, plaintiff requests that the Court set aside its March 31, 1995 judgment because, (as

suggested by the Court during oral argument), the Clerk failed to mail a copy of the January 12, 1993 entry of judgment, (as required by the Rules of the Court), thus denying notice reasonably calculated to apprise plaintiff of an opportunity to present his objections to the judgment as mandated by the due process clause of the U.S. Constitution.

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 314, 70 S.Ct. at 657.

Goldhofer Fahrzeugwerk GmbH & Co. v. United States, 885 F.2d 858, 861 (Fed.Cir. 1989).

After rendering significant injustice by means of pervasive legal error,[1] this Court further compounded plaintiff's injuries by withholding notice of its January 12, 1993 entry of judgment.[2] To remedy the injustice and injury, plaintiff respectfully requests that the Court set aside its judgment.

Respectfully submitted
(Pro Se)

S/ Gerald F. Arens
Gerald F. Arens (Date Signed: May 15, 1995)
71 Parker St. East Longmeadow, MA 01028
(413)525-3156
Express Mail No. EG905576633US

[1] Arens v. United States, 969 F.2d 1034, 1040 (Fed. Cir. 1992).

[2] Plaintiff was thus unable to file an earlier motion to set aside that judgment. Consequently, the March 31, 1995, Docket No. 94-289C, judgment of this Court applied the statute of limitations to bar the unadjudicated claim asserted in Count Fifteen of plaintiff's Docket No. 103-88C amended complaint. (Plaintiff has filed a notice of appeal regarding the Docket No. 94-289C judgment based in part on the failure of the Court to provide notice of the January 12, 1993 judgment as required by the Rules of the Court).

In the United States Court of Federal Claims

No. 94-289C
(Filed: June 15, 1995)

GERALD F. ARENS,

Plaintiff

v.

THE UNITED STATES,

Defendant

ORDER

On May 18, 1995, plaintiff filed a motion pursuant to RCFC 60 to set aside the judgment entered March 31, 1995. Defendant filed an opposition on June 5, 1995. Plaintiff, on June 12, 1995, filed an opposition to defendant's opposition.

Plaintiff s RCFC 72 notice of appeal to the Federal Circuit of the March 30, 1995, order and the March 31, 1995, judgment was filed on May 15, 1995.

Plaintiff's motion to set aside the judgment asserts that he never received the judgment in docket No.103-88C that was entered on January 12, 1993. Plaintiff asserts that he was denied an opportunity to present his objections to the January 12, 1993, judgment in docket No. 103-88C and that, at the time of oral argument in this case on March 29, 1995, he did not know the reason for his lack of notice regarding the January 12, 1993, judgment. He contends this factual context has a bearing on the March 31, 1995, judgment that dismissed his May 5, 1994, complaint as barred by limitations.

The complaint in this docket was a new claim and not a continuation of the claim in docket No. 103-88C. Plaintiff sought a review of the DOT BCMR docket No. 69-93 relative to his June 3, 1983, involuntary retirement. Plaintiff, on June 20, 1994, filed extracts from the Administrative Record (AR) of the docket No. 69-93 proceedings. These AR extracts included the December 18,

1992, remand order in docket No. 103-88C as an attachment to AR extract Item 2. Item 2 was plaintiffs December 27, 1992, "Supplementary Memorandum." The December 18, 1992, remand order, on page 2, footnote 5, includes the CAFC statement, "[t]hus, this court vacates the Claims Court grant of summary judgment and partial dismissal, making that judgment as it was entered on an erroneous interpretation of the withdrawn regulation...." It is clear that plaintiff knew the judgment in docket No. 103-88C would be vacated after the CAFC mandate was issued.

Plaintiff's May 15, 1995, appeal to the CAFC of the March 31, 1995, judgment caused this court to lose jurisdiction over the claims in this docket. As a general proposition, when a final judgment is entered and a timely appeal has been filed, the trial court loses jurisdiction over the case except to act in aid of the appeal or to correct clerical errors. Without jurisdiction, this court is without power to grant relief under RCFC 60(b). *Yacht's America, Inc. v. United States, 8* Cl.Ct. 278, 280, *aff'd,* 779 F,2d 656 (Fed.Cir. 1985). A request for a remand is only necessary if the trial court intends to grant the RCFC 60(b) motion. *See also Placeway Const. Corp. v. United States, 19* Cl.Ct. 484, 487, *modified,* 920 F.2d 903 (Fed.Cir. 1990).

Plaintiff's motion does not provide a sufficient basis to request a remand from the CAFC. There is no basis that would toll the running of limitations.

Plaintiff's contention that the Clerk, under RCFC 77(j), 5(c) and 5(e)(2), is required to attach a certificate of service to a final judgment, when mailed, is erroneous. No provision of the rules extends to the Clerk's office the requirement for a certificate of service for opinions, orders, or other documents mailed to the parties in the case.

On the basis of the foregoing,

IT IS ORDERED:

1. A request to the CAFC for remand of this case is not appropriate.

2. Plaintiff's May 18, 1995, motion to set aside the March 31, 1995, judgment is denied.

S/Kenneth R. Harkins
Kenneth R. Harkins, Senior Judge

In the United States Court of Federal Claims

No. 94-289C

GERALD F. ARENS,

JUDGMENT

v.

THE UNITED STATES,

Pursuant to the court's order of June 15, 1995,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the plaintiff's March 31, 1995, motion to set aside judgment, in accordance with RCFC 60(b), is denied.

David A. Lampen
Clerk of Court

June 20, 1995 By: S/ David A. Lampen
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of all plaintiffs. Filing fee is $105.00.

In the United States Court of Federal Claims

No. 94-289C

GERALD F. ARENS,

CORRECTED JUDGMENT

v.

THE UNITED STATES,

Pursuant to the court's order of June 15, 1995,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the plaintiff's March 31, 1995, motion to set aside judgment, in accordance with RCFC 60(b), is denied.

David A. Lampen
Clerk of Court

June 22, 1995 By: S/ David A. Lampen
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of all plaintiffs. Filing fee is $105.00.

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of Coast Guard Record of:	)	BCMR Docket **No. 69-93**
ARENS, Gerald F. 471 42 1396, LCDR (Ret.)	)	

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It commenced on October 13, 1992, when the applicant filed his application for correction.

The applicant, a retired lieutenant commander (LCDR), asks the Board to correct his military record by (1) recalling him to active duty; (2) reinstating him to the active duty promotion list; (3) voiding all references in his record to his nonselections for promotion to commander; (4) convening a Special Promotion Board, and (5) awarding him retroactive pay, benefits, allowances, attorneys' fees and expenses, "and such other relief as may be deemed appropriate, just, and proper."

On June 3, 1992, the Coast Guard submitted its views on the application. It recommended that relief be denied. The applicant submitted a response to the Coast Guard's views in which he reiterated his claim. The applicant and the Coast Guard subsequently filed additional submissions concerning the claim.

Summary of Action Regarding Applicant's Cases

11/25/81:	Applicant filed first application for correction.
1/20/83:	Board denied first application (BCMR No. 57-82).
3/16/83:	Applicant filed a request for reconsideration of the Board's decision of 1/20/83.
7/8/84:	Board denied request for reconsideration of the 1/20/83 decision (BCMR No.101-83(R)).
9/4/84:	Applicant filed second application for correction.

10/14/87: Board denied second application (BCMR No. 279-84).

11/6/87: Applicant filed a request for reconsideration of the Board's decision of 10/14/87 (BCMR No. 40-88(R)).

2/17/88: Applicant filed a petition for judicial review in the United States Claims Court.

3/13/88: Board denied request for reconsideration of the 10/14/87 decision (BCMR No. 40-88(R)).

6/3/88: The United States filed a motion to stay the applicant's judicial proceeding in the United States Claims Court for 90 days to "allow" the Board to "conduct a personal hearing it has granted" to the applicant. According to the motion, the applicant "joined in this motion."

10/5/88: Board conducted an oral hearing in regard to the applicant's case.

11/18/88: Applicant filed a request with the Board to withdraw his application for reconsideration.

10/31/91: The United States Claims Court granted the United State's motion for summary judgment.

12/9/91: Applicant appealed to the United States Court of Appeals for the Federal Circuit (CAFC).

9/22/92: CAFC issued an Opinion and Judgment in *Arens v. United States*, 969 F.2d 1034 (Fed. Cir. 1992), *reh'g denied*, Sep. 16, 1992, in which it directed the United States Court of Federal Claims (formerly known as the United States Claims Court) to take specified action.

10/13/92: The applicant submitted a new application for correction of his military record. The applicant claimed in his new application that at least two promotion board members who considered him for promotion used inappropriate factors in their consideration and consequently failed to select him for promotion.

12/18/92: The United States Court of Federal Claims issued an order in which it directed the Board to vacate its 10/14/87 decision in regard to the applicant's claim concerning his failures of selection. The order also instructed the Board to allow the applicant to withdraw his application for correction of his military record in accordance with his 11/18/88 application withdrawal request. In addition, the Court of Federal Claims indicated that if the applicant chose to reopen his application to the Board and contest denial of his promotion, he must do so "upon a showing of good cause," as required by section 52.30-23 of title 33 of the Code of Federal Regulations.

12/27/92: Applicant submitted a "Supplemental Memorandum Showing 'Good Cause' for 'Further Consideration' of Petitioner's Withdrawn Application."

1/29/93: Board vacated its 10/14/87 decision in regard to the applicant's request for relief. In addition, the Board determined that it was appropriate to docket the applicant's 10/13/92 request (BCMR 69-93).

Applicant's Current Request

The applicant argued that a member of each of his two respective promotion boards treated him prejudicially. In support of this allegation, the applicant cited a comment made by the Coast Guard in its November 23, 1988 post-hearing brief following the October 5, 1988 oral hearing conducted by the Board: "Both officers [each of whom were captains and sat on one of the applicant's contested 1981 and 1982 promotion boards] also mentioned that the applicant's rather narrow specialty within a specialty, that is, flight safety as a sub-specialty of aviation, most probably was the cause of his failure of selection." (Br. at 24.)

The applicant contended that this comment demonstrated that, in determining his eligibility for promotion, the Coast Guard violated 14 U.S.C. § 254: "Each member of a selection board shall swear that he will, without prejudice or partiality, and having in view both the special fitness of officers and the efficiency of the Coast Guard, perform the duties imposed upon him."

The applicant argued that the members of his promotion boards also violated Article 14-A-1(b) of the Coast Guard Personnel Manual: "Each member of the board must retain an impartial, unbiased and unprejudiced attitude regarding all officers being considered and regarding all groups and specialized duties in the Coast Guard."

Coast Guard Views

The Coast Guard responded that the applicant mischaracterized the statements of the two selection board members and the summary of those statements contained in the post-hearing brief. The Coast Guard contended that the statements of the two selection board members, as well as the content of the posthearing brief, are only speculative as to why the applicant failed of selection.

The Coast Guard also cited Article 14-A-3(b)(l) of the Coast Guard Personnel Manual (Commandant Instruction M1000.6) (in effect at the time of the applicant's 1982 selection board), which states, in part, "Each officer is expected to have true professional competence in one occupational field and, by reason of assignments outside of his field, to be experienced in one or more other fields; each officer must also be familiar with the general administration of the Service." Article 14A-3(b)(1) of the Personnel Manual (CG 207), in effect during the 1981 selection board, contains the same statement. The Coast Guard contended that this provision demonstrates that officers were and "clearly expected to be assigned outside of their chosen occupational field."

The Coast Guard also stated that the applicant's request should be denied because he has failed to demonstrate the good cause necessary to have the Board reconsider the issues raised in his withdrawn application.

Relevant Portions of Statements of Two Selection Board Members

The captain who served on the applicant's 1981 commander selection board testified at the Board's oral hearing:

> Well, in general, speaking in generalities, anyone who stays in any specialty too long is probably going to be adversely effected. If you stay in one thing for eight years and don't broaden your background, whether it's operations or administration or flight safety, it might

have a tendency to be viewed as a somewhat limited experience when you're competing with a group of highly qualified -- remember we have a best qualified process. You don't have to do anything wrong. We just select the best qualified, and that's based upon experience, background, et cetera. And sometimes that could possibly impact. (Tr. at 162.)

The captain who served on the applicant's 1982 commander selection board stated in his affidavit submitted to the Board:

> One observation is that aviators, with limited backgrounds such as [the applicant's], as a whole do not do well at this particular level. Within that community, flight safety officers did not fare well in 1982. It should also be noted that the 1982 board was [the applicant's] second time for being considered for promotion to commander. Although no constraints were placed on the selection board with regard to the selection of individuals who had previously failed selection, in actual fact, those individuals who have already been passed over, do not statistically do well the second time they are considered, and the 1982 board was no exception. (Aff. at 7.)

FINDINGS AND CONCLUSIONS

The Board makes the following findings of fact and conclusions of law on the basis of the submissions of the applicant and the Coast Guard, the applicant's record, and applicable law:

1. Section 1552(b) of title 10, United States Code, requires that applications be filed within three years of discovery of the alleged error or injustice.

2. The applicant filed his first request for relief in November 1981. There has been no break in the proceedings between that time and his February 1988 filing for judicial review with the United States Claims Court. Following several years of litigation, an order was issued in December 1992 by the United States Court of Federal Claims (formerly the United States Claims Court) that directed the Board to vacate its October 14, 1987 decision in regard to the applicant's claim and to allow him to reopen his application upon a showing of good cause as required by section 52.3-25 of title 33 of-the Code of Federal Regulations. Accordingly, it

is appropriate to consider the statute of limitations as running from the December 1992 United States Court of Federal Claims decision.

3. The applicant filed his present application in October 1992 and filed a supplemental submission in December 1992 concerning "good cause" as to why his application should be considered. The application was therefore timely filed.

4. In order to void failures of selection, the applicant must meet a two-part test. First, he must demonstrate that the Coast Guard committed an error or caused an injustice and, secondly, he must establish that the error is causally linked with the failure of selection. *Engels v. United States*, 678 F.2d 173 (Ct. Cl. 1982). The applicant has not met the first part of this requirement. He has failed to prove that the Coast Guard committed an error or injustice in regard to his failures of selection.

5. The applicant bases his claim upon the Coast Guard's characterization in its post-hearing brief of statements given by two members of applicant's selection boards, one of whom testified at a special oral hearing conducted by this Board and the other who provided a sworn affidavit. The nature of this comment by the Coast Guard in its post-hearing brief is argumentative and purely speculative. This comment does not constitute sufficient evidence to demonstrate that there was an error or injustice concerning the applicant's failures of selection.

6. In addition, neither of the selection board members' statements proves that the applicant's selection boards were improperly conducted or that there was a defect in the applicant's failures of selection.

7. The selection board members' testimony and affidavit do not support the applicant's claim that the selection board members acted prejudicially in determining his failures of selection.

8. All of the remaining claims made by the applicant have been previously considered and denied.

9. Accordingly, the applicant's request should be denied.

ORDER

The request for the correction of the military record of LCDR Gerald F. Arens, 471 42 1396, USCG (Ret.), is denied.

S/ Sharon Y. Vaughn
Sharon Y. Vaughn

s/ Michael K. Nolan
Michael K. Nolan

DATE: Mar 11 1994

s/ Angelo Collaku
Angelo Collaku

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

GERALD F. ARENS,	)	
Plaintiff,	)	**No. 103-88C**
	)	
v.	)	**Filed: December 18, 1992**
	)	
THE UNITED STATES,	)	
Defendant.	)	

REMAND ORDER

Pursuant to the Opinion and Judgment of the United States Court of Appeals for the Federal Circuit (CAFC) in *Arens v. United States*, 969 F.2d 1034 (Fed. Cir. 1992), and the mandate and instructions included in that decision,[1] this court vacates the decision of the Board for Correction of Military Records (BCMR) issued on October 14, 1987.[2] Also, pursuant to the instructions of the appellate court, this court remands plaintiff's case to the BCMR, with instructions to the BCMR to allow Lieutenant Commander Arens to withdraw his application for correction of military records in accordance with the "Applicant's Unconditional Withdrawal of Application," filed November 18, 1988.[3]

According to the CAFC's reading of 33 C.F.R. § 52.30-25 (1988),[4] when, on the second reconsideration of plaintiff Arens' second application for correction of his military records, the peti-

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[1] The Judgment was entered September 22, 1992.

[2] The Opinion of the United States Claims Court in *Arens v. United States*, which plaintiff Arens appealed to the CAFC can be found at 24 Cl. Ct. 407 (1991).

[3] Plaintiff, Arens, filed both a conditional request to withdraw his second application to the BCMR on November 8, 1988 and an unconditional request to withdraw on November 18, 1988.

[4] The regulatory language of 33 C.F.R. S 52.30-25 applicable to plaintiff's case states:

> **§ 52.30-25 Withdrawal.**
>
> The Board shall permit the applicant to withdraw his application at any time before a final determination by the Secretary. Any further consideration by the Board of the issues raised in the withdrawn application shall be given only upon a showing of good cause.

tioner requested withdrawal of that second application, the BCMR was obligated to do just that. The CAFC Opinion found that once plaintiff asked to withdraw his application to the BCMR, the Board should have neither continued its consideration, nor issued a final opinion on plaintiff's October 14, 1987 application. The CAFC read 33 C.F.R. § 52.30-25 (1988) as comprised of two independent sentences, and, therefore, rejected this court's plain meaning reading of the regulation by which the Board could continue consideration of the application upon "a showing of good cause." The CAFC concluded that the word "shall" in the first sentence of 33 C.F.R. S 52.30-25 was a mandatory direction to the Board to allow an applicant to withdraw a petition upon request.

Because of the complicated, long and repetitive history of plaintiff's many attempts to get the BCMR to consider and reconsider his position, it is important in this remand to be extremely clear as to exactly which of plaintiff's applications to the BCMR is allowed to be withdrawn.[5] It is clear from the administrative record that both the "Applicant's reply to BCMR Request for Record Corrections and Conditional Withdrawal of Application," filed by plaintiff on November 8, 1988, and the "Applicant's Unconditional Withdrawal of Application," filed November 18,

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[5] In its Opinion, the CAFC addressed vacating this court's and the BCMR's decisions a number of times, but without reference to dates. The first reference included is: "This Court vacates and remands." *Arens v. United States*, 969 F.2d at 1035. The CAFC's CONCLUSION also contains several additional references:

> . . . Thus, this court vacates the Claims Court's grant of summary judgment and partial dismissal, making that judgment a nullity as it was entered based on an erroneous interpretation of the withdrawal regulation, and remands this case to the Claims Court with instructions that it vacate the Board's decision and order the Board pursuant to 33 C.F.R. § 52.30-25 (1988), that Mr. Arens be allowed to withdraw his application, thus returning this case to the point in time when the Board should have granted Mr. Arens' Unconditional Withdrawal request. At this point, Mr. Arens, if he chooses to pursue his action, upon a showing of good cause as enunciated in the regulation, may attempt to prevail upon the Board to take up further consideration of his case, otherwise his administrative case may have voluntarily come to an end.

Arens v. United States, 969 F.2d at 1040 (emphasis added).

1988, constituted a request to withdraw plaintiff's second application to the BCMR, which was filed on September 12, 1984.

The history of the case is that plaintiff Arens was twice passed over for promotion and, therefore, involuntarily retired pursuant to 14 U.S.C. § 285 (1988). Plaintiff twice appealed to the BCMR and requested correction of his military records. First, after having been denied promotion once, on December 2, 1981, he requested that certain fitness reports be corrected so that he could be considered for a promotion without the stigma of having been passed over. This application was denied on January 20, 1983. Plaintiff then moved for reconsideration on March 23, 1983, which was also denied on July 8, 1984. Plaintiff next filed for review of his military records again on September 24, 1984, this time after having been denied promotion for the second time. The Board again denied plaintiff's request for relief on October 14, 1987, noting that the plaintiff had failed to meet his burden of proving even a prima facie case. Plaintiff then requested reconsideration of the second application on November 6, 1987, which was denied on March 13, 1988.

The plaintiff filed the instant action in the United States Claims Court on February 17, 1988. The proceedings in the United States Claims Court, however, were stayed, at the request of both parties, to allow a special evidentiary hearing on plaintiff's conspiracy allegations at the agency level. After the testimony on the alleged conspiracy was received by the BCMR, but before the BCMR had issued its decision, plaintiff filed an "Applicant's Reply to BCMR Request for Record Correction and Conditional Withdrawal of Application" on November 8, 1988, requesting the withdrawal of his application for correction if the Coast Guard was allowed to file a post-hearing brief. Shortly thereafter, on November 18, 1988, plaintiff filed an "Applicant's Unconditional Withdrawal of Application" demanding "the immediate withdrawal of his application."

The Coast Guard refused to allow the plaintiff to withdraw his application and filed a document titled "Coast Guard Response to Applicant's Withdrawals of Application," issued on December 20, 1988. The Board concluded that, based on the language of 33 C.F.R. § 52.30-25, there was "good cause" for the Board to continue its consideration. The BCMR noted that the United States would suffer prejudice if the petitioner were to be allowed to with-

draw at such a late stage of the proceedings, especially in light of the stay in the proceedings in the United States Claims Court pending the reconsideration of the Board. The BCMR, therefore, issued a final decision on plaintiff's application rejecting the application on February 10, 1989. In its final decision, the BCMR cited to the "considerable resources of time and effort in finding, preparing and transporting witnesses for the October 5, [1988] hearing, in participating in the hearing and in preparing arguments, motions, answers and a post-hearing brief," as a showing of "good cause" for the BCMR to continue. The CAFC has found this decision not to allow plaintiff to withdraw his application to be inconsistent with 33 C.F.R. § 52.30-25.

After remand, once the Board allows plaintiff to withdraw his application, Mr. Arens is still left with two denials for promotion and, thus, involuntary retirement pursuant to 14 U.S.C. § 285.[6] If the plaintiff chooses to reopen his application to a BCMR and contest denial of his promotion, he must do so "upon a showing of good cause," as the language included in the second sentence of 33 C.F.R. § 52.30-25 indicates. The Coast Guard's decision on plaintiff's first application to the BCMR, after the denial of his first promotion, issued on January 20, 1983, remains final. Moreover, this court points out that plaintiff's burden of proving "good cause" remains a heavy one.

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[6] It should be noted that the Federal Circuit's decision, vacating and remanding this court's opinion, did not take issue with the fact findings of this court based on this court's review of the complete record or its findings that there was no substantial evidence of conspiracy against plaintiff; that the boards were properly formed; and that the decisions reached were not arbitrary or capricious.

CONCLUSION

In order to comply with the instructions of the United States Court of Appeals for the Federal Circuit, this court, hereby, VACATES the BCMR's decision, dated October 14, 1987, in the case of Lieutenant Commander Arens and ORDERS that the BCMR allow plaintiff Arens to withdraw his second application, filed on September 12, 1984 with the BCMR.

IT IS SO ORDERED.

S/ MARIAN BLANK HORN
MARIAN BLANK HORN
JUDGE

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 103-88C

GERALD F. ARENS,

JUDGMENT

v.

THE UNITED STATES,

Pursuant to the July 8, 1992 opinion of the Court of Appeals for the Federal Circuit and the remand order of December 18, 1992, vacating the October 14,1987, decision of the Coast Guard's Board for Correction of Military Records,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the case is remanded to the Board for Correction of Military Records, in order for the Board to allow plaintiff to withdraw his second application, filed on September 12, 1984.

IT IS FURTHER ORDERED AND ADJUDGED that jurisdiction is not retained by this court in this case.

David A. Lampen
Clerk of Court

January 12, 1993

By: s/
Deputy Clerk

U.S. Const. amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 2501.

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

U.S. Court of Federal Claims; Rule 5.

Rule 5. Service and Filing of Other Papers

(a) Service; When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties.

(b) Same; How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party by mailing it to the attorney or party at the last known address or, if no address is known, by leaving it with the clerk. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with

a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the attorney's or party's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing, but filing is not.

(c) Filing; Certificate of Service. All papers after the complaint **required** to be **served** upon a party, together with a certificate of service, shall be filed with the court, except that depositions upon oral examination and notices thereof, written questions, interrogatories, requests for documents, requests for admission, and answers and responses thereto and other related discovery materials shall not be filed unless on order of court. See Rule 83.

(d) Filing with the Court Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with chambers, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Papers may not be filed by facsimile transmission. All matters are to be brought to the attention of a judge through formal filings rather than by correspondence; letters are not to be directed to a judge unless specifically requested.

(e) Proof of Service. (1) Service shall be made by the party, attorney of record or any other person acting under the attorney of record's direction. The person making service shall execute a certificate of service that contains the following information:

(A) the day and manner of service;

(B) the person and/or entity served; and

(C) the method of service employed, e.g., personal, mail, substituted, etc.

(2) The certificate of service shall be attached at the end of the original document, including appendices, and copies thereof. If service other than by mail is used and it is impractical to attach the certificate at time of filing, such certificate may be filed subsequently.

(3) The certificate may at any time be amended or supplied unless to do so would result in material prejudice to the substantial rights of any party.

U.S. Court of Federal Claims; Rule 60.

Rule 60. Relief From Judgment or Order

(a) Clerical mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under subdivision (b) of this rule does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action or relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

U.S. Court of Federal Claims; Rule 77(j).

(j) Notice of orders or judgments. Immediately upon the entry of an order or judgment, the clerk shall serve a notice of the entry in the manner provided for in Rule 5 upon each party who is not in default for failure to appear and shall make a note in the docket of

the service. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

§ 254. Selection Boards: oath of members

Each member of a selection board shall swear that he will, without prejudice or partiality, and having in view both the special fitness of officers and the efficiency of the Coast Guard, perform the duties imposed upon him.

(Added Pub. L. 88-130, § 1 (10)(C), Sept. 24, 1963, 77 Stat. 179.)

§ 259. Officers to be recommended for promotion

(a) A selection board convened to recommend officers for promotion shall recommend those eligible officers whom the board considers best qualified of the officers under consideration for promotion. No officer may be recommended for promotion unless he receives the recommendation of at least a majority of the members of a board composed of five members, or at least two thirds of the members of a board composed of more than five members.

(b) The number of officers that a board convened under section 251 of this title may recommend for promotion to a grade below rear admiral (lower half) from among eligible officers junior in rank to the junior officer in the appropriate promotion zone may not exceed—

(l) 5 percent of the total number of officers that the board is authorized to recommend for promotion to the grade of lieutenant or lieutenant commander;

(2) $7^{1}/_{2}$ percent of the total number of officers that the board is authorized to recommend for promotion to the grade of commander; and

(3) 10 percent of the total number of officers that the board is authorized to recommend for promotion to the grade of captain;

unless such percentage is a number less than one, in which case the board may recommend one such officer for promotion

(Added Pub. L. 88-130, § 1 (10)(C), Sept. 24, 1963,77 Stat. 180, and amended Pub. L. 97-417, § 2(4), Jan. 4, 1983, 96 Stat. 2085; Pub. L. 99-145 title V, § 514(c)(1), Nov. 8, 1985, 99 Stat. 629.)

§ 261. Selection Boards; submission of reports

(a) A board convened under section 251 of this title shall submit its report to the Secretary. If the board has acted contrary to law or regulation, the Secretary may return the report for proceedings in revision and resubmission to the Secretary. After his final review, the Secretary shall submit the report of the board to the President for his approval, modification, or disapproval.

(b) If any officer recommended for promotion is not acceptable to the President, the President may remove the name of that officer from the report of the board.

(c) Upon approval by the President the names of officers selected for promotion by a board convened under section 251 of this title shall be promptly disseminated to the service at large.

(d) Except as required by this section, the proceedings of a selection board shall not be disclosed to any person not a member of the board.

(Added Pub. L. 88-130, § 1(10)(C), Sept. 24, 1963, 77 Stat. 181.)

U.S. Coast Guard Personnel Manual, (1981-82).
Chapter 14-A-1 GENERAL

(a) The action of personnel boards, whether they be for promotion, continuation, retention or appointment, is of such significance to every officer that the procedure of these boards and the general criteria used by them should be common knowledge throughout the Service.

(b) The criteria published herein are furnished boards solely for guidance and do not limit the scope of authority vested in personnel boards. Each member of the board must retain an impartial, unbiased and unprejudiced attitude regarding all officers being considered and regarding all groups and specialized duties in the Coast Guard. Any limitation of choice arbitrarily imposed on such

boards by an outside authority would either be unlawful or highly improper.

...

Chapter 14-A-3 CRITERIA FOR SELECTION

(a) General. Personnel boards make recommendations on either a best qualified or fully qualified basis as directed in the precept. The type of information considered by all personnel boards is fundamentally the same. However, each board will develop its own overall standards and criteria. The degree of significance assigned to each of the many factors to be considered will vary according to the grade level and the type of selection with which the board is concerned. A board selecting officers for lieutenant may place emphasis on different factors than would a captain continuation board.

(b) Basic Criteria

(l) Performance of Duties. A significant criterion for selection is performance in present and past assignments. Performance of duty not only proves an officer's worth, but considered with his personal qualities is the best indicator of his potential for greater responsibility. Promotion is not a reward for satisfactory service, but confirmation of demonstrated potential to serve the Coast Guard in a higher grade. Boards should adhere to the following interpretations and policies regarding the evaluation of performance.

a. The diversity of officer assignments in the Coast Guard makes it impossible for any officer to be qualified for all of them or to have a measurable proficiency in each of the various occupational fields. To attain and continue to maintain an officer corps with true professional competence in each field, it is necessary to limit the diversity of assignments for individual officers. Each officer is expected to have true professional competence in one occupational field and, by reason of assignments outside of this field, to be experienced in one or more other fields; each officer must also be familiar with the general administration of the Service. Professional competence as a Coast Guard officer in a specific field should be of primary significance through the grade of commander. However it should be recognized that in the grades of ensign and lieutenant (junior grade) it is unlikely that an officer will

have sufficient experience to have developed a high degree of professional competence in a specific area.

...

Chapter 14-A-4 GENERAL PROCEDURE APPLICABLE TO ALL BOARDS

(a) Each member of a personnel board shall evaluate impartially and fairly the fitness of each officer whose name is submitted to the board. This evaluation shall be in the light of the overall criteria established by the board considering the parameters outlined in Article 14-A-3.

...

Chapter 14-A-10 SELECTION BOARDS FOR PROMOTION FROM LIEUTENANT (JUNIOR GRADE) THROUGH REAR ADMIRAL

(a) Convening of Boards. At least once a year and at such times as the needs of the Service require, the Secretary shall convene selection boards to recommend for promotion to the next higher grade officers on the active duty promotion list in each grade from lieutenant (junior grade) through captain, with separate boards for each grade. However, the Secretary is not required to convene a board to recommend officers for promotion to a grade when no vacancies exist in the grade concerned, and he estimates that none will occur in the next 12 months. (14 U. S. C. 251)

...

(d) Oath of Members of Selection Boards. Each member of the selection board shall swear that he will, without prejudice or partiality, and having in view both the special fitness of officers and the efficiency of the Coast Guard, perform the duties imposed upon him. (14 U. S. C. 254)

...

(g) Submission of Reports of Selection Boards

...

(4) Except as required by this Article, the proceedings of the selection board shall not be disclosed to any person not a member of the board. (14 U. S. C. 261)

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of the U.S. Coast Guard Record of:	)
	) Docket No. 40-88(R)
GERALD F. ARENS 471-42-1396 LCDR USCG (Ret.)	)

TRANSCRIPT OF NOVEMBER 8, 1988 TELEPHONE CONVERSATION BETWEEN CDR RONALD S. MATTHEW AND GERALD F. ARENS.

On Tuesday, November 8, 1988, at approximately 3:03 PM EST, Gerald F. Arens (applicant) received a telephone call from CDR Ronald S. Matthew (Counsel for the Coast Guard). The following is a transcript of the original recording of the conversation that followed.

ARENS: Good afternoon, Arens here.

MATTHEW: Commander Matthew, Coast Guard Headquarters.

ARENS: Good afternoon, what can I ...

MATTHEW: The certificate of service mailing date was in error ... a corrected copy has been mailed.

ARENS: But you certified the date.

MATTHEW: It was a word processor error ... just a clerical error, it was not fraud.

ARENS: The certified date really screwed me, if it was a word processor error, why didn't your supervisor catch it?

MATTHEW: It wasn't fraud, you know it wasn't fraud ... define fraud?

ARENS: Why?

MATTHEW: Go ahead, define fraud?

ARENS: Depends on the jurisdiction, fraud can have anywhere between four and eight elements ... defini-

tion depends on jurisdiction and whether its civil or criminal.

MATTHEW: Don't you know that intent is required?

ARENS: Intent doesn't have to be subjective, it can be objective or implied by malicious or reckless misrepresentation ... what's the big deal? what's your point?

MATTHEW: You said that I was guilty of fraud because of the mistake ... the wrong date.

ARENS: No I didn't.

MATTHEW: Yes you did ... I know you did.

ARENS: Fraud is not the word I would have used, I would not have characterized your misrepresentation of the date as being fraud. Have you seen my reply?

MATTHEW: No I haven't, but you said fraud.

ARENS: If you haven't seen my reply how would you know what I said? Did Nancy Battaglia call you?

MATTHEW: I talked to her ... she told me to call you ... why would I intentionally use the wrong date? what's the mailing date of the certificate of service?

ARENS: September twenty-seventh.

MATTHEW: And when was the hearing?

ARENS: October fifth.

MATTHEW: Then it would be impossible for September twenty-seventh to have been correct.

ARENS: I don't understand, why would it be impossible for you to file a motion for a post-hearing brief before the hearing ... then certify that I was mailed a copy of the motion on September twenty-seventh?

MATTHEW: It was a mistake, a mistake, don't you understand, all it was was a simple mistake? Didn't you ever make a mistake? Look at the transcript of the hearing, you made mistakes, a lot of mistakes, and corrected yourself.

ARENS: Well I never certified one, look, I told you at the hearing how pleased ... I complimented you for your integrity in taking the high road in your role as an adversary, and I said that I wished your predecessor would have taken such an adversarial role.

MATTHEW: No harm was done by the mistake, what harm was, did you suffer by the mistake?

ARENS: The BCMR has rules, I have only thirty days to file a reply ...

MATTHEW: So what's your harm?

ARENS: Well, the certificate of service indicates that I received ... that the motion was mailed to me on September twenty-seventh, and I have only thirty days to reply ...

MATTHEW: What's your harm?

ARENS: I didn't actually receive the motion until after thirty days had passed.

MATTHEW: So?

ARENS: Well, by not replying within the time limit ... it's too late for me to reply.

MATTHEW: No. It would have been impossible for me to send ... submit the motion before the hearing was held.

ARENS: Not necessarily, you can submit pre-hearing motions ...

MATTHEW: I want you to understand every word that I'm going to say ... I'll do all the talking, you just listen. There's no way you can win this thing ... Melvin and Eagan will swear to whatever it takes to shoot you down ... besides, the BCMR isn't stupid, they know who signs their paychecks, if you prevail [pause] they'll be looking for new jobs ... so if you continue to play this silly game, I have some ... big guns that I can bring to bear against you.

ARENS: What do you mean, use your big guns to shoot me down?

MATTHEW: I have big guns that I haven't used, do you understand? You will end up being a big loser if I use them. You're still subject to the UCMJ ...

ARENS: What are you talking about?

MATTHEW: Calling your employer ... your job ... there are things your employer at the law school should know about you, do you understand? ... Do you understand?

ARENS: 203-677-7701 ... Are you threatening me?

MATTHEW: What do you think?

ARENS: Well it sure sounds like a threat, after the Coast Guard ... look at my BCMR application ... the big guns were certainly used to shoot Dave Zazzali down. I feel threatened, extremely threatened. Until you explain what you're talking about, I'll treat it as a threat.

MATTHEW: You're paranoid, you're really sick, you should see a psychiatrist, you're living in a fantasy, a real fantasy world.

ARENS: If I'm paranoid, telling me about the big guns you're going to bring against me and that you're going to call my employer and interfere with my job, that would have a profound effect ... is it a fantasy that Captain Olson was intoxicated?

MATTHEW: That's not an issue, do you think you're insane?

ARENS: Why did you call me?

MATTHEW: You think that every officer in this building has a dart board with a picture of Jerry Arens on it, it just isn't like that, you should see a psychiatrist.

ARENS: Perhaps, you know, I've got to tell you, when I went to the hearing, I went expecting to dislike, actually hate the witnesses. But just the opposite happened, they were, there was nothing to dislike, they were just pathetic old men. You probably noticed that Captain Roy hung around and talked to me ...

MATTHEW: He was very apologetic on the stand.

ARENS: Well he told me some very interesting things ...

MATTHEW: I know, he told me what he told you.

ARENS: He left me with the impression that he was dying ...

MATTHEW: People dying, death threats, you're paranoid, you live in a real fantasy world, you should see a psychiatrist.

ARENS: In my reply I indicated that I would withdraw my application ...

MATTHEW: You can't do that. Your case was remanded ... where did you learn the law? Does your employer know ...

ARENS: It wasn't remanded, the Claims Court merely issued a stay ... I don't have the Code of Federal Regulations right here in front of me. [Long Pause]. Hello, are you still there?

MATTHEW: If you do, you're done. If you withdraw you fail to exhaust your administrative remedies, unless you do, the court has no jurisdiction. You're suppose to be a lawyer?

ARENS: Well I've reviewed over twelve hundred Claims Court cases ...

MATTHEW: And I've reviewed the same cases.

ARENS: Well I appreciate your call, but I have an agreement with the Justice Department ...

MATTHEW: It doesn't matter what you've agreed. I have to get home. I sent a corrected copy to the Board, what are you going to do?

ARENS: I won't know until I get hard copy.

MATTHEW: I mailed a copy to you. I'll read it to you. [Read copy]. So, what's your response?

ARENS: I don't know, using your big guns against me, calling my employer, and ... what else ... the

UCMJ. I'll need time to think about it ... it would be reckless for me to respond prematurely.

MATTHEW: That hasn't stopped you before.

ARENS: I always try to avoid reckless comments. But I know that the Code of Federal Regulations prohibits the filing of briefs and memos after thirty days prior to the hearing date.

MATTHEW: That only applies to you.

ARENS: If that's the way you interpret it ... as not applying to you ... then you can submit briefs and memos, but I can't reply or rebut those memos and briefs.

MATTHEW: But you agreed to post-hearing briefs, wait. [Long pause]. Page 269 of the hearing transcript, I'm going to submit a brief ...

ARENS: OK. Thanks for calling.

MATTHEW: I've got to go. Call me when you decide what you're going to do.

ARENS: Thanks for calling.

AFFIDAVIT OF LCDR GERALD F. ARENS USCG (Ret.)

I, Gerald F. Arens, 71 Parker Street, East Longmeadow, Massachusetts 01028, being duly sworn, do hereby depose and say:

1. This affidavit is made on my own personal knowledge.

2. I am forty nine years of age and competent to testify to the matters stated herein.

3. On Tuesday, November 8, 1988, at approximately 3:03 PM EST, I received a telephone call from CDR Ronald S. Matthew (Counsel for the Coast Guard). The preceding is a transcript of the original recording of the conversation that followed.

S/Gerald F. Arens
71 Parker Street
East Longmeadow, MA 01028

Subscribed and sworn before me, this ____ day of November 1988.

Memorandum

U.S. DEPARTMENT of TRANSPORTATION

UNITED STATES COAST GUARD

Date : 28 FEB 1985
5420

Subject: CGBCMR APPLICATION, DOCKET NO. 279-84

Reply to: G-PO-3
Attn. of: CDR Utley: 426-1378

From: Chief, Officer Personnel Division

To: Chief, Military Justice Division

Ref: (a) Your memo 5420/3 dtd 24 Jan 1985

1. In response to reference (a), the key issue is whether the omission of an "X" in the 9 square of #16 in the subject fitness report would have caused LCDR Arens' passover. I think not.

2. First, this report cannot be considered that significant. It covered a period of only 84 days while LCDR Arens was in a DUINS status with the Air Force and was done because he was promoted to LCDR.

3. Second, the FRI alluded to by claimant is not nearly as important as he would have us believe. The board was required to review his record. The omission could only have been considered Just that - - an omission. In fact, promotion boards are briefed not to consider missing OPR's or FITREP's negatively. The absence of one "X" is far less crucial, than an entire report.

4. I contacted Lt Col J. W. Barnes, the preparing officer, and Col C. G. Lunt, the reporting officer, to see if they had any recollection of this report. Lt Col Barnes remembered LCDR Arens but could add nothing. Col Lunt does not remember LCDR Arens. Therefore, I have no indication other than LCDR Arens' assertion that square should be marked in #16. Based on the above, no relief should be granted.

5. As a matter of interest, as I reviewed the report in question I discovered an "X" had been penciled in the 7 square of #16. This mark was unlike the typed "X's" in the other squares of the report. I have been unable to determine how or when this mark was added. That "X" has been removed.

S/ R.W. Zins
R. W. ZINS

Memorandum

U.S. DEPARTMENT of TRANSPORTATION

UNITED STATES COAST GUARD

Date : 5 MAR 1985

Subject: CGBCMR APPLICATION, DOCKET NO. 279-84

Reply to: 5420/3
Attn. of: G-LMJ

From: Chief Counsel

To: Chairman, Board for Correction of Military Records (C-60)

REF: (a) Application of LCDR Gerald F. Arens 471 42 1396 USCG (Ret.) of 4 SEP 1984

1. In response to reference (a), I am forwarding as the Chief Counsel's advisory opinion, the memorandum from the Chief of Officer Personnel Division, regarding the case of LCDR Arens.

2. In block 16 of the pertinent fitness report, it is noted that both the 7 and 9 squares have been marked with whiteout. Paragraph 5 of enclosure (1) explains square 7, but not square 9. Communication with Officer Personnel Division reveals that an X was placed in square 9 by that division in anticipation that contact with the reporting officers would verify LCDR Arens' allegation. When the reporting officers could not confirm the appropriate square to be marked, the 9 square was whited out.

3. I recommend that all relief be denied.

S/ W.B. Steinbach
W. B. STEINBACH
By direction

Encl: (1) COMDT (G-PO) memo 5420 dtd 28 FEB 1985

Memorandum

U.S. DEPARTMENT
of TRANSPORTATION

UNITED STATES
COAST GUARD

Date : 29 APR 1985

Subject: CGBCMR APPLICATION, DOCKET NO. 279-84 (ARENS)

Reply to: 5420/3
Attn. of: G-LMJ

From: Chief Counsel, U.S. Coast Guard

To: Chairman, Board for Correction of Military Records (C-60)

REF: (a) Ltr from BCMR to G-LMJ requesting response to applicant's additional evidence, dtd 27 MAR 1985

1. In compliance with reference (a), I have carefully considered the additional evidence submitted by LCDR Arens as regards his current BCMR application. My transmittal letter, dated 5 March 1985, and the memorandum from Chief, Officer Personnel Division, dated 28 February 1985, adequately discuss any changes made to LCDR Arens' fitness report. Therefore, no further comment or explanation is deemed necessary.

2. LCDR Arens' unsupported allegations of "Blacklist" are too vague to overcome the presumption of regularity within the Coast Guard administrative system. Therefore, this office will not present an opinion concerning this matter.

S/ W.B. Steinbach
W. B. STEINBACH
By direction

U.S. Department of Transportation
United States Coast Guard

Commandant
United States
Coast Guard

Washington, DC 20593
Staff Symbol: G-PO
Phone: (202) 426-2738

8 MAY 1985

LCDR Gerald F. Arens, USCG, Retired
71 Parker Street
E. Longmeadow, Massachusetts 01028

Dear Commander Arens:

On behalf of Admiral Gracey, I am replying to your letter of 12 March 1985 in which you requested a copy of an investigation naming you as a party. Although you did not make specific reference to an investigation, you made a similar request to Mr. Underwood in a letter dated 30 March 1985. In his reply of 10 April 1985, Mr. Underwood informed you that a search of your records failed to disclose the information you sought and referred your letter to Captain Biondo. I assume Captain Biondo's reply to you of 15 April 1985 has clarified the situation. As Captain Biondo said, he did not conduct an investigation nor did he take notes or keep records of the various telephone inquiries he made. Obviously, if an investigation was not conducted you could not have been named a party to it.

Although not necessary, I want to confirm what Mr. Underwood and Captain Biondo have already stated on the matter. As Chief, Office of Personnel I certainly would have been aware of any investigation concerning you I can assure you that an investigation was neither ordered nor conducted.

I trust this letter is responsive to your inquiry and lays to rest any concerns you may have had regarding your involvement in an investigation.

Sincerely,

S/ Henry H. Bell
HENRY H. BELL
Rear Admiral, U. S. Coast Guard
Chief, Office of Personnel

U.S. Department of Transportation United States Coast Guard

Commandant
United States
Coast Guard

Washington, DC 20593
Staff Symbol: G-PO-3
Phone: (202) 426-1378

5720
JUN 12 1985

Mr. Gerald F. Arens
71 Parker Street
E. Longmeadow, Massachusetts 01028

Dear Mr. Arens:

This letter responds to your request of May 13, 1985, for a release of information under the Freedom of Information Act (FOIA).

I am enclosing the following records from the 1981 and 1982 Commander Selection Boards:

a. A listing of the members, including non-voting members.

b. A statistical breakdown of the results of the 1981 Commander Selection Board. This summary was compiled by the Board; therefore, the Officer Personnel Division does not guarantee its accuracy.

Board members are selected by the Chief, Officer Personnel Division. Board presidents are approved by the Chief, Office of Personnel. Individuals outside the Office of Personnel normally have no role in the selection of board members.

Commander Melvin served on the October 1982 Commander Selection Board. Captain Eagan served on the October 1981 Commander Selection Board. They have not served on any other common, consecutive boards.

A copy of Article 20-B-2, Personnel Manual, COMDTINST M1000.6 is enclosed as the current directive on urinalysis testing in the Coast Guard.

Also enclosed are copies of the citations to accompany the award of the Distinguished Flying Cross to Captain Frank W. Olson and Lieutenant Commander Robert A. Melvin. We found no record of the Distinguished Flying Cross having been awarded a Lieutenant Commander Ellis.

We are searching our records for the other documents you requested, and when they are found will determine their

releasability. If releasable, they will be sent under separate correspondence.

s/ R.D. Utley
R. D. UTLEY
By direction

Encl: (1) 1981 and 1982 Commander Selection Board Membership
(2) Statistical Summary of 1981 Commander Selection Board
(3) Statistical Summary of 1982 Commander Selection Board
(4) Copy of Article 20-B-2, Personnel Manual, COMDTINST M1000.6
(5) Citation to Accompany the Distinguished Flying Cross awarded to Captain Olson
(6) Citation to Accompany the Distinguished Flying Cross awarded to Commander Melvin

MEMBERS OF OCTOBER 1981
COMMANDER SELECTION BOARD

CAPT James C. Irwin
CDR Hugh L. Thomas Jr.
CDR Delbert L. Hemphill
CDR William J. Loefstedt
CDR William R. Arnet Jr.
CDR Marcel J. Bujarski
CDR Robert A. Melvin III

LCDR Richard R. Mead, non-voting recorder

MEMBERS OF OCTOBER 1982
COMMANDER SELECTION BOARD

CAPT Milton Y. Suzich
CAPT Homer A. Purdy
CDR Philip J. Kies
CDR Lance A. Eagan
CDR Richard S. Bizar
CDR Michael B. Stenger
CDR Michael C. Grace

LCDR Melvin W. Garver, non-voting recorder

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Mailing Address: G-PO-2/TP42
U.S. Coast Guard
Washington, DC 20593
(202) 426-0935

1210
22 JUL 1980

Ms. P. F. McHenry
12 Observatory Lane
Pocasset, MA 02559

Dear Ms. McHenry:

Please excuse the delay in resonding to your letter concerning the termination of Lieutenant (junior grade) David B. Zazzali's flight status. As a result of a just completed investigation into the circumstances surrounding the termination, I have ordered that his flight status be restored: effective immediately.

There is no question that operating a single engine helicopter from the flight deck of a cutter in the hostile Alaskan environment is hazardous. However, since commencement of this operation in 1971 we have had only one minor helicopter accident and it did not result in loss of either life or airframe. All possible safety precautions are taken and suggestions for improvement are eagerly sought and thoroughly evaluated.

Just as I have considered and evaluated the situation presented in your letter, I suggest that you examine your role as the wife of a Coast Guard Officer. After thoughtful reflection I think you will agree that you should assume a supporting and complimentary role rather than one that is destructive of your husband's career.

Sincerely,

s/ J.B. Hayes
J.B. Hayes
Admiral, U.S. Coast Guard
Commandant

Date 7/23

To: CAPT TINGLEY

Board

1. Bob Melvin

2. Lance Eagan

s/ GEO
DEPUTY CHIEF OF STAFF

DEPT OF TRANSP OB (USCGHQ 8045B REV 1-80)

U.S. Department of Transportation

General Counsel

400 Seventh St., S.W.
Washington. D.C.
20590

JAN 26 1989

Mr. Gerald P. Arens
71 Parker Street
East Longmeadow, Massachusetts 01028

Dear Mr. Arens:

This letter relates to a telephone conversation you had on January 6, 1989 with John Groat of the Department of Justice and James Dann of this Office. In that conversation, you stated that you believed that you had been threatened by the Coast Guard in connection with a proceeding pending before the Board for Correction of Military Records (Board).

I understand that the Coast Guard has, in official documents filed before the Board, contended that the statements you interpreted as constituting threats were, in essence, intemperate remarks, made in the heat of argument and not intended as threats, and that no retaliatory action had been or would be taken against you. An apology for the remarks was also extended. Mr. Dann advises me that he inquired into the matter, and is of the firm opinion that the Coast Guard representations are sincere ones.

Nonetheless, given the gravity of your allegations, I do wish to further assure you that any actions to intimidate or harass persons involved in DOT proceedings cannot and will not be condoned. If you believe that any specific actions have been taken or are being initiated against you by the Coast Guard, in reprisal for your pleadings or arguments before the Board (or, for that matter, before the Federal Courts), please contact me immediately through Mr. Dann. He can be reached at (202) 366-9154.

Sincerely,

S/ B. Wayne Vance
B. Wayne Vance

cc: John Groat, DOJ
Adm. Joseph E. Vorbach,
Chief Counsel, USCG

U.S. GOVERNMENT PRINTING OFFICE: 1978--724-582

DEPARTMENT OF TRANSPORTATION
U.S. COAST GUARD
CGHQ-4745 (Rev. 11-76)

OFFICE OF THE COMMANDANT
CORRESPONDENCE/ACTION SHEET
(Instructions on reverse)

1. CG CONTROL NO. **C 9662**
2. INCOMING DATE **6/10/80**

3a. OFFICE	3b. DIVISION	3c. BRANCH
O **P**	G-OSR-2 **PO**	

3. ACTION Is Assigned to
3d. INDIVIDUAL **6/12** **PO2**

4. FOR APPROPRIATE ACTION
FOR DIRECT REPLY
COMEBACK COPY REQUIRED

5. SUBJECT/IDENTIFICATION

P. F. McHenry of no date
sub ; Concerning the LT Zazzali case - Helo Safety

6. OST CONTROL NO.

7. PREPARE:
X LETTER
BLUE DIGEST
SEE REMARKS
MEMO
MESSAGE

FOR SIGNATURE OF COMMANDANT

CLEAR WITH

8. INFORMATION
X G-C/84

9. REMARKS
MRS. GERRY ARENS

BLACKLIST ARENS
S/ GEO

10. REFER INQUIRIES TO:
COMMANDANT'S OFFICE
EXT. 62381

11. DATE DUE IN G-C/84
6/24/80

12. FINAL ACTION

PREVIOUS EDITIONS MAY BE USED